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DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

LII. VICTORIÆ.

[IN THE COURT OF APPEAL.]

1888
Oct. 31.

GRAHAM *v.* LEWIS.

Mayor's Court—Jurisdiction—Prohibition—Mayor's Court (Extension) Act, 1857 (20 *&* 21 *Vict. c. clvii.*), *s.* 12—*Construction of Words, "Carry on business."*

By s. 12 of the Mayor's Court (Extension) Act, 1857, "Where the debt or damage claimed in any action shall not exceed 50*l.* no plea to the jurisdiction shall be allowed, provided the defendant, or one of the defendants shall dwell or carry on business within the city of London":—

Held (affirming the decision of the Queen's Bench Division), that a clerk employed by a solicitor at his office, which was within the city of London, did not "carry on business" there within the meaning of s. 12, so as to give the Mayor's Court jurisdiction to try an action in which the clerk was defendant.

APPEAL from a decision of the Queen's Bench Division, reported under the name of *Lewis* v. *Graham* (1).

The action was brought in the Mayor's Court for a trespass alleged to have been committed at Lewisham, in Kent.

The damages claimed did not exceed 50*l.* The defendant lived at Lewisham, but was employed as clerk by a solicitor at the solicitor's office, which was within the city of London.

(1) 20 Q. B. D. 780.

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The Queen's Bench Division having granted an application made on behalf of the defendant for the issue of a writ of prohibition to the Mayor's Court, the plaintiff appealed.

Crump, Q.C., and *Leslie Probyn*, for the appellant. It is submitted that the respondent did "carry on business" in the City within the meaning of s. 12 of the Mayor's Court (Extension) Act, 1857, and therefore that the Mayor's Court had jurisdiction to try the action. *Ex parte Breull, In re Bowie* (1), is a decision directly in point; and the cases of *Buckley* v. *Hann* (2) and *Sangster* v. *Kay* (3) are either overruled by *Ex parte Breull, In re Bowie* (1), or they are distinguishable from the present case on the ground that the words construed in each of them were "shall carry on *his* business," thus differing from the words of s. 12, which do not contain the word "his." In *Ex parte Breull, In re Bowie* (1), Lush, L.J., pointed out that the bankruptcy rule then under consideration did not provide that the debtor should carry on *his* business, shewing that the learned Lord Justice thought that if that word had been in the rule, the construction might have been different. The Court below in the present case proceeded on the authority of *Buckley* v. *Hann* (2) and *Sangster* v. *Kay* (3), and distinguished *Ex parte Breull, In re Bowie* (1) on the ground that the Court in respect of which the question arose was a Court of unlimited jurisdiction, and that the bankruptcy rule was a rule providing for the distribution of business, and no question of jurisdiction arose. It is submitted that this distinction is not a valid one. The bankruptcy rule enabled a creditor to issue a debtor's summons when the debtor resided or carried on business within the district of the London Bankruptcy Court. The rule, therefore, founded jurisdiction to give a remedy in the nature of execution against a debtor, and the same principle of construction ought to be applied to the words of s. 12, which gives an extension of jurisdiction to the Mayor's Court, the objects both of the rule and of s. 12 being similar.

Candy, Q.C. (*Daldy*, with him), for the respondent, was not heard.

(1) 16 Ch. D. 484. (2) 5 Ex. 43.

(3) 5 Ex. 386.

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LORD ESHER, M.R. In this case the Court has to construe words occurring in the 12th section of the Mayor's Court (Extension) Act, 1857. The Mayor's Court is a local court exercising jurisdiction over an area defined by boundaries appearing on the map; and if it were a merely local court and nothing more, its jurisdiction would be limited by the boundaries of the City, and every material fact necessary to found jurisdiction must, by the general law applicable to local courts, have taken place within the locality defined by those boundaries. The 12th section, dealing with such a local court having jurisdiction within defined boundaries, enlarges that jurisdiction in a peculiar way by enacting that in the particular case no plea to the jurisdiction shall be allowed. In a certain sense the section departs from the idea of locality by speaking of persons—not of facts to found jurisdiction which are to happen within the locality. The jurisdiction is practically enlarged by providing that want of jurisdiction shall not be pleaded in certain cases, but the provision is limited to a particular class of persons who "shall dwell or carry on business within the city of London." Now, supposing we ought to construe those words, "carry on business," according to their ordinary business meaning in the locality with respect to which they were used, I think there is but little doubt what meaning should be given to them. The term "carry on business" is a well-known term in the city of London. Certain liabilities applied to women, although they were married women, who carried on business in the City; and nobody, I should think, would doubt that the phrase, as applied to them, meant the carrying on of business by a person whose business it was that was carried on. Nobody, I should think, would assert that every shopwoman in the City carried on business within the meaning of that established phraseology. I am of opinion, looking at this Act of Parliament, that we ought to give the words their primary business sense, already well-known in the City, namely, the carrying on of business by the person whose business it is. The Act meant to extend the jurisdiction of the Mayor's Court to persons who carry on some trade—not to persons who merely obey orders. If that be the true view, the words should be construed as though they had been "provided the defendant shall carry on *his or her* business within

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the city of London;" and if that be so, we have two authorities, accepted and acted upon for years—acted upon indeed by the Court below in the present case—which have decided that a clerk whose only business is to obey orders does not "carry on his business" within the meaning of those words, because it is not his business that he carries on but that of his master. The man who cuts out for his master gloves in a shop, although he does in a sense effectuate the business of the production of gloves, is not carrying on his own business but his master's. It is said that the two cases of *Buckley* v. *Hann* (1) and *Sangster* v. *Kay* (2) have been overruled by the decision of the Court of Appeal in *Ex parte Breull, In re Bowie* (3), and that by reason of that decision this Court is obliged to hold that every servant who does anything in his master's business in the city of London is himself carrying on business within s. 12. In that case the Court were construing the words "carrying on business" in one of the bankruptcy rules. What is the ground of their decision? They say that they are going to decide the construction according to their view of the object and intent of the rule in question. They also say that the words are capable of an ordinary business sense, and an enlarged sense, and that the object and intent of the rule being to provide for the distribution of bankruptcy business between the Court of Bankruptcy, which has a general jurisdiction, and provincial courts, they ought to give to the words the enlarged sense, that is, a sense larger than their primary and ordinary business sense. But having regard to the object and intent of the statute with which we have to deal in the present case, which statute applies to a local jurisdiction limited by boundaries defined on the map, there is nothing to oblige us to say that the words, "carry on business within the city of London," should have any other than the primary and ordinary business sense which would be accepted in the City. I think that those words mean to describe a person managing or conducting his own, and not somebody else's, business. He must either manage or conduct a business of his own or the business which is managed or conducted for him must be his own. I am of opinion that the words are not meant to apply

(1) 5 Ex. 43. (2) 5 Ex. 386.

(3) 16 Ch. D. 484.

to a clerk who assists another person to carry on his business, and is bound to obey his employer's orders, and has himself no control or direction with respect to that business.

For these reasons, I am of opinion that the decision of the Queen's Bench Division was right, and this appeal fails.

FRY, L.J. In this case we have to construe the words "carry on business within the city of London" as a ground for founding jurisdiction. One must inquire what is the natural meaning of those words? Do they in their natural meaning include a clerk employed in the city of London as was the defendant here? And ought the natural meaning to be applied in construing the 12th section of the Mayor's Court (Extension) Act, 1857? Now, I think that the expression "carry on business" is not ordinarily used in the sense of a person being busy or doing business merely. A butler employed to look after his master's plate and perform the other duties of his occupation may be a very busy man, but he could not be said to be carrying on business. A man who busies himself about science, the volunteer movement, or politics, though he may have a great deal of business to transact in respect of those matters, does not carry on business. I think that the expression has a narrower meaning than that of doing business or having business to do. In my opinion it imports that the person has control and direction with respect to a business, and also that it is a business carried on for some pecuniary gain. If that be so, it seems evident that this solicitor's clerk does not carry on business in that sense. The case of *Ex parte Breull, In re Bowie* (1), no doubt does at first sight seem to be contrary to the construction we are putting upon the words "carry on business." But the Court of Appeal were then dealing with the Court of Bankruptcy which has a general and universal jurisdiction, and they had to look at the significance of the words when used in a rule providing for the distribution of business between the London Court of Bankruptcy and provincial Courts. I think the decision proceeded on the ground that, having regard to the object and intention of the rule, the Court thought that they ought to give a secondary meaning to the words instead of their primary and

(1) 16 Ch. D. 484.

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ordinary meaning. They state the object and intention of the rule, and say that the words used in it are ambiguous and elastic, and they proceed to put a meaning upon them which will carry out that object and intention. I therefore think that their decision is no real authority against the construction we are putting upon the words as used in the 12th section of the Mayor's Court (Extension) Act, 1857. I think that those words ought to be construed according to their ordinary and natural meaning, which would not include a person employed as the respondent was here.

LOPES, L.J. I am of opinion that the omission of the word "his" in the 12th section of the Mayor's Court (Extension) Act, 1857, is immaterial. I think that the expression "provided that the defendant shall carry on business within the city of London" means "provided that the defendant shall carry on *his* business within the city of London." I also think that those words imply some control and direction with respect to the business as distinguished from mere service, employment, or occupation. A solicitor's clerk cannot, in my opinion, be said to be carrying on *his* business by assisting in carrying on the business of the solicitor. It is not the clerk's business, but the solicitor's which is carried on. If the construction for which the appellant contends were applied, every shop-assistant and every servant employed in a business in the City would be brought within the 12th section. The cases of *Buckley* v. *Hann* (1), and *Sangster* v. *Kay* (2), are in favour of this view; and I think that the case of *Ex parte Breull, In re Bowie* (3) is not inconsistent with it. The construction put upon the words "carry on business" in that case was applied to the subject-matter of a bankruptcy rule having for its object the distribution of business between the London Court of Bankruptcy and provincial Courts, but the Mayor's Court (Extension) Act, 1857, has a wholly different object, namely, to extend the jurisdiction of a local Court. I may also observe that neither of the cases *Buckley* v. *Hann* (1), and *Sangster* v. *Kay* (2) were cited in *Ex parte Breull, In re Bowie* (3). I am

(1) 5 Ex. 43. (2) 5 Ex. 386.
(3) 16 Ch. D. 484.

of opinion that we are not bound to apply the same construction here as was applied in that case. I think that the decision of the Queen's Bench Division was right, and this appeal should be dismissed.

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Appeal dismissed.

Solicitors for appellant: *Aird & Hood.*

Solicitors for respondent: *Groom & Co.*

W. A.

BICKERS *v.* SPEIGHT.

Nov. 14.

Practice—Writ specially indorsed—Sufficiency of Indorsement—Rules of Supreme Court, 1883, *Order* III., *r.* 6, *Order* XIV.

A writ is specially indorsed within the meaning of Order III., r. 6, and Order XIV. if the indorsement gives sufficiently specific particulars to bring to the mind of the defendant knowledge as to what the plaintiff's claim is.

Any indorsement which would have been a sufficient special indorsement within the meaning of s. 25 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), to entitle the plaintiff to judgment, under s. 27, in default of appearance, is a special indorsement within the meaning of Order III., r. 6, and Order XIV.

APPEAL by the plaintiff from the order of Sir James Hannen, who had affirmed the order of the master refusing to allow the plaintiff to enter judgment under Order XIV., and giving leave to defend.

The writ was indorsed as follows: "The plaintiff's claim is 130*l.* due to him from the defendant under and by virtue of an assignment under the hand of one Martha Inman, and dated July 14, 1888, particulars whereof are as follows:" The indorsement then set out the alleged assignment in these words; "I do hereby authorize and request you to pay to Mr. Emanuel Bickers of &c., the sum of 130*l.*, being the amount due or to become due from you to me, as appears by an I. O. U. signed by you, and dated February 4, 1885, and his receipt for the same shall be a good discharge." The I. O. U. was made an exhibit, and contained the words "for money lent."

Macaskie, for the defendant. There is a fatal objection to the plaintiff's appeal. The writ is not specially indorsed within the meaning of the Rules of Supreme Court, 1883, Order III., r. 6,

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and therefore the plaintiff cannot be entitled to judgment under Order XIV.: *Parfaite Frères* v. *Dickinson.* (1) The decision in *Aston* v. *Hurwitz* (2) does not apply, for the language of the rules has since been altered. By Order XX., r. 1, the special indorsement is to be deemed to be the statement of claim. Therefore by Order XIX., r. 4, it must contain a statement of the material facts relied on. By Order XX., r. 8, "In every case in which the cause of action is a stated or settled account, the same shall be alleged with particulars." This is not done here. The expression "due or to become due" is insufficient; it should be stated how much is due, and how much is accruing due. By the last words of Order III., r. 6, "such special indorsement shall be to the effect of such of the Forms in Appendix C., s. 4, as shall be applicable to the case." The particulars in those forms are much more specific than in this indorsement.

J. S. Green, for the plaintiff. The special indorsement is sufficient to shew the defendant what the claim made against him is, and to afford him the means of knowing whether it is well founded or not: *Smith* v. *Wilson.* (3)

LORD COLERIDGE, C.J. I am of opinion that the judgment of Bramwell, L.J., in *Aston* v. *Hurwitz* (2), lays down the true principle on which cases like the present depend, which is that what under the Common Law Procedure Act, 1852, would have been held to be a sufficient special indorsement to enable the plaintiff to sign judgment in default of appearance, is a sufficient special indorsement within the meaning of Order III., r. 6, and Order XIV. If sufficient particulars are stated to bring to the mind of the defendant knowledge as to what the plaintiff's claim is, there is a good special indorsement. This appears from the decision in *Smith* v. *Wilson* (4) in the Court of Appeal. Jessel, M.R., said in his judgment in that case: "Rule 6 of Order III. requires that the indorsement shall contain the particulars of the amount sought to be recovered. Its object is well stated by Cockburn, C.J., in *Walker* v. *Hicks* (5), 'The defendant is entitled to have sufficient particulars to enable him to satisfy his mind whether he ought

(1) 38 L. T. (N.S.) 178.
(2) 41 L. T. (N.S.) 521.
(3) 4 C. P. D. 392; affirmed 5 C. P. D. 25.
(4) 5 C. P. D. 25.
(5) 3 Q. B. D. 8.

to pay or resist,' and Mellor, J., also in that case, says: 'Before the plaintiff can ask for final judgment, the defendant ought to have afforded him, by the indorsement of reasonably specific particulars of claim on the writ, an opportunity of seeing whether the claim is one to which he has any defence or not.' This writ is indorsed, 'To goods,' and the amount is carried out. Everybody knows what it means, and the defendant also knows perfectly well it means 'goods sold to you.'"

It seems to me therefore that, unless we are concluded by express words in the Rules of 1883, we should hold that this writ is sufficiently specially indorsed, following these two decisions of the Court of Appeal. There are no words in the new Rules which render those decisions inapplicable, and therefore, I am of opinion that the objection which has been taken to this special indorsement must fail.

WILLS, J. I am of the same opinion. The altered language of the Rules of 1883 at first sight seemed to raise a difficulty, but I think the principle laid down in *Aston* v. *Hurwitz* (1) is still applicable. In the present case the contents of the I. O. U. may be reasonably supposed to be within the knowledge of the defendant, just as in that case the contents of the account rendered might be supposed to be within the knowledge of the person to whom it had been rendered; and the I. O. U. contains the elements which are wanting in the earlier part of the indorsement.

The appeal was then heard on the merits, when it appeared that there was a conflict on the affidavits, and the order giving leave to defend was affirmed.

Appeal dismissed.

Solicitors for plaintiff: *Godfrey, Rhodes & Co., for Frank Dwyer, Dewsbury.*

Solicitor for defendant: *W. J. Mitton, for Hammond, Bradford.*

(1) 41 L. T. (N.S.) 521.

P. B. H.

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[IN THE COURT OF APPEAL.]

SMITH *v.* EDWARDES.

Practice—Solicitor—Action on untaxed Bill of Costs—Summons for Liberty to sign Final Judgment—Form of Order—Solicitors Act, 1843 (6 *& 7 Vict. c.* 73), *s.* 37—*Order* XIV., *r.* 1.

In an action upon a solicitor's untaxed bill of costs, where the defendant admits the retainer and the work done, and only disputes the propriety of the charges, an order giving leave to sign final judgment under Order XIV., r. 1, may be made after appearance and before taxation of the bill, provided that the order preserves the right of the defendant under s. 37 of the Solicitors Act, 1843, to the costs of taxation of the bill, if more than one-sixth is taxed off it. Such an order should direct that the bill of costs be taxed pursuant to that statute, and that judgment be signed for the amount of the master's allocatur.

The proper form of order settled by the Court of Appeal.

APPEAL from a decision of the Queen's Bench Division affirming an order made by a judge in chambers giving leave to sign final judgment under Order XIV. r. 1.

The plaintiff, a solicitor, issued a writ of summons against the defendant on June 29, 1888, to recover 161*l.* 9*s.* 3*d.*, the amount of four bills of costs for certain conveyancing business done by him for the defendant. The bills had not been taxed. The defendant entered an appearance in due course, and upon the same day presented a petition in the Chancery Division praying that three of these bills might be taxed under the provisions of the Solicitors Act, 1843. The fourth bill was not included in the petition, as the defendant then disputed it altogether; and on July 6 an order was made ex parte that the bills should be taxed by a Chancery taxing master, which order was subsequently dissolved on the ground that it should have included the whole of the four bills, and not some of them only. On July 9 the plaintiff took out a summons for liberty to sign final judgment under Order XIV. r. 1, upon which the master refused to make any order. Upon appeal to Butt, J., it appeared that the defendant admitted that the work had been done for him by the plaintiff, and that the action was undefended except as to the amount of the plaintiff's charges for the work. The learned

judge thereupon made an order giving the plaintiff liberty to sign judgment "for the amount indorsed on the writ, subject to taxation, and costs to be taxed." An appeal by the defendant to the Divisional Court (Lord Coleridge, C.J., and Bowen, L.J.) was dismissed, the Court stating that they had been informed by one of the masters that the order was made in the ordinary form in use in such cases, and that they could not interfere with an established practice.

The defendant appealed.

Channell, Q.C., and *Anderton*, (*A. G. Walter*, with them), for the defendant. Assuming that this is a specially indorsed writ, although it is for an amount subject to reduction upon taxation, the form in which the order for judgment is drawn up is wrong. By s. 37 of the Solicitors Act, 1843, a defendant who is sued upon a solicitor's bill of costs like those in question may apply to the Chancery Division for a taxation of the bill, and if a sixth of the amount is taxed off the bill the costs of the reference to taxation must be paid by the solicitor. This order is an order for taxation in the action itself, and not for a taxation under the Solicitors Act, and the costs of taxing the bills will have to be paid by the defendant as part of the costs of the action. He is thus deprived of the benefit of the provisions of s. 37 of the Solicitors Act, and the order is wrong. The order should direct that the plaintiff shall have the costs of the action, but that the costs of taxation of the bills shall follow the Solicitors Act: *Larkin* v. *McInerney* (1).

Aspland, Q.C., and *Theodore Ribton*, for the plaintiff.

Cur. adv. vult.

1888. Nov. 19. LORD ESHER, M.R. The plaintiff in this action is a solicitor, and he has brought an action to recover the amount of certain bills of costs for work done by him for the defendant. After the defendant had appeared to the writ the plaintiff took out a summons under Order XIV., r. 1, for leave to sign judgment at once, on which the master made no order. When before the judge in chambers it was admitted by the defendant that he had

(1) 16 L. Rep. Ir. 246.

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no absolute defence to the action, the work having been done by the plaintiff for him; but he said that he disputed the plaintiff's charges and the amount of his bills of costs, and wished the bills to be taxed. Upon this admission the learned judge made an order that the plaintiff should be at liberty to sign judgment "for the amount indorsed on the writ, subject to taxation, and costs to be taxed." That order, the defendant says, is an order for an interlocutory, and not for a final, judgment, and cannot therefore be made under Order XIV., r. 1; and he says further that as the order stands, if after the bills of costs have been taxed more than one-sixth of the amount has been taxed off, the defendant will be deprived of the consequences which the Solicitors Act, 1843, says are to result from such a taxation, that the costs of the taxation shall be paid by the solicitor. To this contention two answers are made by the plaintiff; first, that there is an established practice, which has never been set aside, to draw up orders for judgment under Order XIV. in this form; and, secondly, that such a form does not take away from the defendant any rights which he may have under the Solicitors Act, 1843. Upon appeal to the Divisional Court this order was affirmed, the learned judges being apparently under the impression, after consulting one of the masters, that the order was drawn up in accordance with the established practice, with which they declined to interfere. Since the argument of this appeal we have applied to another master of the Queen's Bench Division and also to the master who was consulted by the Lord Chief Justice and Bowen, L.J., and they both tell us that this order is not in the ordinary form, but is contrary to it. There has, therefore, been a misapprehension in the Divisional Court, arising in all probability from the master understanding the question put to him to be one as to the existence of an established practice as to orders made upon applications under Order XIV., where the action is brought upon a solicitor's bill. It is true that there is an established practice in dealing with such applications; it is not, however, to draw up these orders in this form, but in a very different one. We have therefore to see how far we can say that we do not object to the practice which has grown up, and whether the judgment in this case ought to be allowed to stand, for which

purpose we must carefully consider the rules of practice and the provisions of the Solicitors Act.

Now it is clear that when a summons is taken out under Order XIV., r. 1, there is only one order which can be made upon it; it must be an order that final judgment be entered for a definite amount; that is the only order which, strictly speaking, can be made. A taxation made in the way suggested by this order would not, I think, be a taxation under the Solicitors Act, and if it were carried out in that way the defendant would be deprived of his rights under that Act, viz., that where there is a taxation under that statute, and more than one-sixth of the bill is taxed off, the costs of the reference to taxation are to be paid by the solicitor. We must, therefore, be careful to see what can properly be done upon such an application as the present, and how far we can adopt the practice which has grown up.

Upon a summons taken out under Order XIV., r. 1, if the defendant disputes the right of the plaintiff to judgment at all, or to judgment for part of the sum claimed, it would seem clear that, if he can convince the Court that he has reasonable grounds for either contention, there cannot be judgment for the amount indorsed on the writ. If the defendant admits the claim to a certain amount, but disputes all beyond it, then the judge could direct judgment for the admitted amount; but if no amount were admitted, or seen clearly to be due, then the judge could strictly refuse to make any order under Order XIV., r. 1. He could not say, "I will make an order for the amount found to be due upon inquiry." That is not the meaning of the rule; and I think therefore that an order for judgment cannot be made in the form in which this order is made. It is obvious that "subject to taxation" means "to be altered and diminished by taxation," that is, by an inquiry. It is therefore not an order for final judgment. As far as it is a judgment for the amount indorsed on the writ, it is interlocutory only. It is an order for interlocutory judgment, to become final upon the holding of an inquiry, and it cannot be within the meaning of Order XIV., r. 1. The strict practice, no doubt, would be as follows: where a summons is taken out under Order XIV., r. 1, and the defendant raises the same contention as was raised in the present case, the

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summons would be dismissed, but the defendant would take out a summons for taxation of the bill under the Solicitors Act, and when the amount had been arrived at and the master's allocatur given, another summons would be taken out under Order XIV., r. 1. But what would be the advantage of such a practice? Upon the first summons under Order XIV. there would be one set of costs; upon the summons to tax there would be another set of costs; and upon the final summons under Order XIV. yet another set of costs. That is a state of things which every Court has used its ingenuity to avoid, if possible; and the heaping-up of such unnecessary costs has been avoided without any mischief by the course of practice adopted.

The practice has been, under such circumstances, to treat the powers of the Court or judge as being so enlarged as to enable it to make an order to tax the bill without going through the form of dismissing the summons and then taking out another similar summons after taxation. To that there can be no objection. By the admission of the defendant there will inevitably be judgment against him for an ascertainable sum, which, when ascertained, will enable the plaintiff to proceed under Order XIV. The practice has been, instead of having two summonses, to make an order as though there were a summons to tax the bill of costs under the Solicitors Act; that preserves to the defendant all his rights under that statute; and to treat the summons under Order XIV. as a continuing summons, so that, without making any fresh application, the plaintiff can sign judgment for the amount found due by the allocatur. This practice seems to carry out the intention of the framers of the rules, and also to preserve all the legal rights of the parties under Order XIV. and under the Solicitors Act; and, therefore, upon a summons under Order XIV. this practice may be followed, but the order must be drawn up in a form shewing what is to be done, and preserving the rights of the parties. The form shewn to us by the masters did practically carry this out, but my brother Fry has drawn up a form of order which is in effect the same, but somewhat more explicit, and which under such circumstances may be used without objection. I think, therefore, that the objection to the order made in the present case must succeed, and that the appeal must

be allowed; the order appealed from will be replaced by one in the form which we have approved.

I wish it to be distinctly understood that nothing that I have said is to be taken as preventing anybody from objecting to the master's allocatur, and exercising his ordinary right of appeal from it.

FRY, L.J. There are two objections to this order, which gives liberty to sign judgment for the amount indorsed on the writ subject to taxation. In that order there is no finality, for the amount does not appear in the judgment, which was intended to be final and not interlocutory, and not to be for an amount capable of being reduced by some subsequent proceeding. The second objection is, that the right of the defendant to the costs of of taxation if one-sixth of the bill is taxed off, which is given by the Solicitors Act, 1843, seems to be lost by the order; at any rate, the order as drawn up leaves it doubtful whether that right is preserved. I think, therefore, that the order cannot stand in its present form, and a form of order has been settled by us after consultation with the masters, which will for the future be the proper form to follow in cases like the present.

I may make one or two observations on the effect of an order in this form. The direction that there shall be a taxation pursuant to the statute makes the order carry with it the statutory consequences of such a taxation; it preserves all rights of objection and appeal, and to the costs of the taxation; all this is imported into the order by the reference to the statute. The master's allocatur will be final; it will be an allocatur after the addition or subtraction (as the case may be) of the costs of taxation of the bill according to the statute, and it will be for a definite amount for which final judgment may be signed. That is the order for which the defendant asks, and we have no difficulty in making it. Cases may arise in which the defendant may object to the making of any order for judgment under Order XIV., and in such an event I agree with an intimation of the Master of the Rolls that such an order could be made even against an objecting defendant.

I may add, though it is unnecessary to decide the point now,

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that I can see no reason why, in the exercise of its general jurisdiction, the Court should not order a reference to taxation, and, under its special jurisdiction, give judgment for the amount so to be ascertained.

LOPES, L.J. I am of the same opinion.

Appeal allowed.

The following is the form of order drawn up by Fry, L.J., and approved by the Court:—

"It is ordered that the bills of costs on which this action is brought be referred to the taxing master pursuant to the statute 6 & 7 Vict. c. 73, and that the plaintiff give credit at the time of taxation for all sums of money received by him from or on account of the defendant. And let the plaintiff be at liberty to sign judgment for the amount of the master's allocatur in the said taxation, and costs to be taxed."

Solicitor for plaintiff: *C. F. Smith.*

Solicitors for defendant: *Slark & Metcalfe.*

W. J. B.

Dec. 1.

[IN THE COURT OF APPEAL.]

STEEDMAN *v.* HAKIM.

Practice—Appeal from Chambers—Appeal from Order made during Vacation—Time—Order LII., *rr.* 3, 5; *Order* LIV., *r.* 24.

In an appeal from the decision of a judge at chambers given in vacation, two clear days notice of motion must be given within five days, and for a day within eight days, after the decision, although no Divisional Court sits within the eight days.

THIS was an appeal from an order of Denman, J., at chambers affirming an order of the master giving the defendant unconditional leave to defend the action.

The order of Denman, J., was made on September 11, and on October 1 the plaintiff served the defendant with a notice of motion by way of appeal for October 24.

Clayton, for the defendant. There is a preliminary objection that the appeal is out of time. The notice ought to have been given within eight days, and so that the motion could have been

heard, if necessary, within eight days: Order LIV., r. 24; Order LII., r. 3, 5.

Scrutton, for the plaintiff. The appeal is not out of time. This case is within the latter part of rule 24 of Order LIV., there having been no Court which could hear the motion before October 24, for which day notice was given. [He cited *Wallingford* v. *Mutual Society*. (1)]

LORD COLERIDGE, C.J. I am of opinion that this preliminary objection must prevail. The practice is not now the same as it was when *Runtz* v. *Sheffield* (2) was decided, for since that case the second part of Order LIV., r. 24, has been added. Under the then practice a man might have taken every step in his power to enable him to appeal and yet have been defeated, which was undoubtedly an unjust state of things. Now, however, by the addition of the alternative in the last part of the rule, that injustice is prevented, and a man is not deprived of his right of appeal because a Court does not happen to sit within the eight days. It is now provided that, as far as the hearing of the appeal is concerned, if there is no Court to hear it within eight days the time for hearing is extended. By Order LII., rr. 3, 5, it is a condition precedent to the right of obtaining a hearing that two clear days' notice of motion shall be given. The true effect of these three rules, when read together, is that every appeal from chambers must be by notice of motion properly given within eight days, even during the vacations. Thesiger, L.J., points out in *Runtz* v. *Sheffield* (3) that the sitting of a Divisional Court during the Long Vacation is contemplated by the rules, and as a matter of fact I have myself sat in such a Divisional Court. If in this case it had happened that a Divisional Court had sat during the last vacation this appeal could not have been heard upon the notice which had been given. No injustice whatever is caused to anyone by the present practice. Notice of motion by way of appeal from chambers must be given during the vacations just the same as during the sittings: otherwise the right of appeal would be very largely extended in matters arising during the vacations, which, in my opinion, was never intended.

(1) 5 App. Cas. 685, 691 (2) 4 Ex. D. 150. (3) 4 Ex. D. at p. 153.

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CAVE, J. I am of the same opinion. It can clearly be inferred from the language of the rules that our construction of them is right. Order LIV., r. 24, says: "Every appeal to the Court from any decision at chambers shall be by motion and shall be made within eight days after the decision appealed against, or if no Court to which such appeal can be made shall sit within such eight days, then on the first day on which any such Court may be sitting after the expiration of such eight days." By Order LII., r. 3, the motion must be made upon notice, and by rule 5 there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion. Therefore, reading these three rules together, it follows that notice must be given within eight days, and such a notice as would enable the motion to be heard within eight days, which, to comply with the rule requiring two clear days, must actually be given within five days. The latter part of Order LIV., r. 24, only relates to the hearing of the motion, and therefore whether a Court be sitting or not a two clear days' notice must be given within five days; when the appellant has done that he has done everything necessary in order to have his appeal heard, and under the present practice his notice of motion is entered in a list and comes on to be heard where there is a Court sitting able to hear it. I therefore come to the conclusion that in this case the appellant has not done that which the rules, impliedly at any rate, require him to do, and that he has not given a due notice of motion which could have been heard within eight days.

Appeal dismissed.

W. A.

The plaintiff appealed.

1888. Nov. 28. *Scrutton*, for the plaintiff.

Henn Collins, Q.C., and *Clayton*, for the defendant. The arguments were the same as in the court below. The following additional cases were cited: *Runtz* v. *Sheffield* (1); *Stirling* v. *Dubarry* (2); *In re Coulton, Hamling* v. *Elliott* (3).

Cur. adv. vult.

(1) 4 Ex. D. 150.

(2) 5 Q. B. D. 65.

(3) 34 Ch. D. 22.

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Dec. 1. LORD ESHER, M.R. In this case an interlocutory order was made at chambers by Denman, J., on September 11, and on October 1 notice of motion by way of appeal for October 24 was given by the plaintiff to the defendant; and on this day the motion would have been made but for the fact that the list was full, so that it was not actually made till November 1. A preliminary objection was taken to the hearing of the motion, not on the ground that November 1 was the wrong day upon which to make it, but upon the ground that the notice of motion was served too late. The notice was served on October 1, so that it was obviously given more than two clear days before the day on which it was intended to move the Court. The objection, however, is that it ought to have been given within five days of September 11, the date of the decision appealed against; and the solution of this question depends upon the true construction to be placed upon Order LIV., r. 24, and Order LII., r. 5. It is said that upon a comparison of these two rules it will be seen that it is implied, though obviously it is not expressly directed, that notice of appeal from an interlocutory order must be given within five days of the date of the order. Now if this implication is to be made from these two rules, it could not be made from them as they stand now. Looking at Order LIV., r. 24, it is plain that it gives two different days upon which the motion can be made; it does not give them alternatively, so as to enable the appellant to make his motion on which of the two he pleases, but it gives two different days which will be available under different circumstances. If a Court is sitting on the eighth day after the decision appealed against, then the motion must be made on that day; if no Court is sitting on the eighth day, then it must be made on the first day on which a Court sits afterwards; this it is clear is not an alternative, but a substantive rule for differing sets of circumstances. Then by Order LII., r. 5, there must be two clear days between the service of a notice of motion and the day named in the notice for hearing the motion; so that if the motion is to be made on the eighth day it is a necessary implication that the notice of motion must be given on the fifth day after the decision. If, however, the motion is to be made on the other day mentioned in Order LIV., r. 24, i.e., on the first day on which

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a Court sits after the eighth day (there being no Court sitting on the eighth day), then it is plain that according to the strict grammatical construction of Order LII., r. 5, the notice of motion might be given two clear days before that other day. It is evident that the problem presented to us cannot be solved by a mere grammatical interpretation of these rules as they now stand, and we are bound to look at their history.

Now, Order LIV., r. 24 (1), originally provided simply that every appeal from chambers should be by motion, and should be made within eight days after the decision appealed against, and at that time Order LII., r. 5 (1), was also in existence, so that it was a necessary implication from these two rules as they then stood that the notice of motion must be given within five days after the decision at chambers. For a long time these rules remained unaltered; but the difficulty arose that sometimes no Divisional Court sat in the Long Vacation, and in *Runtz* v. *Sheffield* (2) the Court of Appeal reluctantly came to the conclusion that, although the notice of motion had been given within the five days, the motion could not be made because no Divisional Court was sitting on the eighth day. A suggestion was made in the judgment in that case that the rule should be altered, and an alteration was made by adding the words which now form the second half of Order LIV., r. 24. If the judges in making the alteration had intended to do away with the then recognized rule that notice of motion must be given within five days they would have done so in express terms. Can we see any reason why they should not have done so? It seems to me easy to find a good reason. There would be a grave inconvenience in allowing the notice of appeal to stand over for a long time upon a mere doubt as to whether a Divisional Court would be likely to be sitting, and so leaving it open to the defeated party to decide whether he will give his notice two days before October 24 or two days before some day on which a Court might be announced to sit; and we do not intend to adopt a view of these rules which would be so inconvenient in its consequences and might result in

(1) In the original Rules of Court made in 1875, these rules were numbered as Order LIV., r. 6, and Order LIII., r. 4, respectively.

(2) 4 Ex. D. 150.

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inflicting considerable hardship upon the party who had been successful in chambers. If a notice of motion could be given at so late a date, everything which it was intended by a judge's order in chambers to be done might have been done, and yet every thing would be re-opened by the appellant's notice of motion; for example, if an order had been made by a judge at chambers under Order XIV., r. 1, giving liberty to sign final judgment, everything might be completed during the Long Vacation and the judgment satisfied, and yet the whole question might be re-opened two days before the sittings. I come, therefore, to the conclusion that the judges in making this addition to the rule did not intend to do away with the recognised practice arising by necessary implication from the then existing rules, that notice of motion by way of appeal from a judge in chambers must be served within five days of the decision appealed against. The notice of motion given in the present case was therefore too late, and all notices similarly given are too late. The decision of the Divisional Court was right and must be affirmed.

FRY, L.J. I am of the same opinion. It is said that a notice of motion given two clear days before a Court sat which could hear the appeal would be a good notice within Order LIV., r. 24, and Order LII., r. 5. I cannot yield to this contention. The notice must be a good notice at the time when it is received by the respondent, so that he may know whether he shall attend to it or not. It is conceded that if a Divisional Court had sat within eight days of the decision in the present case, this notice of motion would have been bad; it can therefore only be upheld on a contingency, the contingency that a Court would not sit until at least two clear days after it had been served, and it is therefore a bad notice. In my opinion the notice, to be good, must be served two clear days before the eighth day from the making of the order appealed against, that is to say, not later than the fifth day after that date; it will then come on on the eighth day or on the earliest day thereafter on which a Court sits. This construction of the rules is one of great practical utility; it does not allow the appellant to remain quiet from August 13 to October 21, without giving any notice to the

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respondent of his intention to appeal. And it must further be remembered that if the notice is given within five days of the decision, it would be competent for the respondent to ask that a Divisional Court might sit to dispose of it during the vacation, which would probably be done if there were sufficient business to justify the formation of a Court, but which could not possibly be done if the notice were not given till two or three days before the commencement of the sittings. This notice was therefore bad, and the decision of the Divisional Court must be affirmed.

LOPES, L.J. I am entirely of the same opinion. The question depends upon the true construction of Order LIV., r. 24, and in my opinion the words added to the original rule were not intended to interfere with the practice which existed up to the time of that addition.

Appeal dismissed.

Solicitors for plaintiff: *Saw & Son.*
Solicitors for defendant: *Thompson & Ward.*

W. J. B.

[CROWN CASE RESERVED.]

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June 16;
Nov. 10.

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Criminal Law—Husband and Wife—Communication of Venereal Disease—Offences against the Person—Offences against Women—"Unlawfully and maliciously inflicting grievous bodily harm"—"Assault occasioning actual bodily harm"—24 & 25 *Vict. c.* 100, *ss.* 20, 47.

The prisoner was convicted upon an indictment charging him with "unlawfully and maliciously inflicting grievous bodily harm" upon his wife, and with "an assault" upon her "occasioning actual bodily harm," under ss. 20 and 47 respectively of 24 & 25 Vict. c. 100. It appeared that at a time when the prisoner knew, but his wife did not know, that he was suffering from gonorrhœa, he had connection with her, that the result was that the disease was communicated to her, and that, had she been aware of his condition, she would not have submitted to the intercourse:—

Held, by Lord Coleridge, C.J., Pollock and Huddleston, BB., Stephen, Manisty, Mathew, A. L. Smith, Wills, and Grantham, JJ. (Field, Hawkins, Day, and Charles, JJ., dissenting), that the conduct of the prisoner did not constitute an offence under either section of the statute, and that the conviction must be quashed.

Reg. v. *Bennett* (4 F. & F. 1105) and *Hegarty* v. *Shine* (14 Cox, C. C. 124, and C. A. 145) considered.

CASE stated by the Recorder of London and reserved by the Court for the consideration of all the judges, before thirteen of whom, viz. Lord Coleridge, C.J., Pollock, B., Field, J., Huddleston, B., Manisty, Hawkins, Stephen, Mathew, Day, A. L. Smith, Wills, Grantham, and Charles, JJ., it was argued.

The prisoner, Charles James Clarence, was tried at the Central Criminal Court upon an indictment charging him in the first count with "unlawfully and maliciously inflicting grievous bodily harm" upon his wife Selina Clarence; in the second count with an "assault" upon her, "occasioning actual bodily harm," statutory offences under ss. 20 and 47 respectively of 24 & 25 Vict. c. 100. It appeared that on December 20, 1887, the prisoner, who was to his, but not to his wife's knowledge, suffering from gonorrhœa, had connection with her; that the result was the communication of the disease to her, and that had she been aware of the prisoner's condition she would not have submitted to the intercourse. The prisoner was not defended.

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The recorder directed the jury that if these facts were proved to their satisfaction, they might find the prisoner guilty on either count of the indictment, notwithstanding that the prosecutrix was his wife. The jury found the prisoner guilty. The question for the opinion of the Court was whether the direction was right, and whether the prisoner could properly be found guilty on both or either of the counts. If the verdict could be sustained on both or either of the counts, the conviction was to stand; if otherwise, it was to be quashed.

Forrest Fulton, (instructed by the Solicitor to the Treasury at the instance of the Court), for the prisoner. The conviction ought to be quashed. The conduct of the prisoner as stated in the case does not constitute either of the statutory offences described in the indictment, the first count of which is framed in the language of s. 20, the second is that of s. 47 of 24 & 25 Vict. c. 100. (1)

As regards the first count, the prisoner cannot be convicted of the statutory misdemeanour, unless his conduct has been such as not only to "inflict" some "grievous bodily harm" upon his wife, but to do so "unlawfully and maliciously," expressions which involve the intentional commission of an unlawful act. But, conceding that the facts shew an infliction of grievous bodily harm, there is no evidence of any intention on the prisoner's part to convey the infection. It is laid down in Hale's Pleas of the Crown (vol. i. p. 629), that a husband cannot be guilty of rape upon his wife, and though this proposition is doubted in Stephen's Digest of the Criminal Law (ed. 1877), p. 172, it would seem to have been always generally accepted.

(1) By 24 & 25 Vict. c. 100, s. 20: "Whoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

By s. 47: "Whosoever shall be convicted upon an indictment of an assault occasioning actual bodily harm shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labour."

It is true that the act of the prisoner, if followed by the result which ensued, would entitle the prosecutrix to a judicial separation; but this does not shew that the act, which might or might not have been followed by such a result, was itself unlawful: *Ciocci* v. *Ciocci*. (1) In *Reg.* v. *Martin* (2), in which a conviction under the section was sustained in this court, where the conduct imputed consisted in putting out the gas in a theatre to cause a panic, and then obstructing the egress of the spectators, the "unlawfulness" of the acts of the prisoners was the express ground of the decision. Here, the act of the prisoner was not "unlawful," and he cannot be convicted of "maliciously and unlawfully inflicting grievous bodily harm" under s. 20.

The second count is a charge of "assault" under s. 47. If coition, as between husband and wife, cannot constitute rape, it follows that coition cannot as between them constitute an assault by the husband. Consent to coition on the part of the wife is a matrimonial obligation, and consent was also, according to the evidence in this case, expressly given by the prosecutrix. It is true that the communication of disease under similar circumstances, where the parties were not married, was held by Willes, J., in *Reg.* v. *Bennett* (3), to constitute an assault on the part of the man, a decision which was followed by Shee, J., in *Reg.* v. *Sinclair* (4); but these cases were examined and doubted by Irish Courts in *Hegarty* v. *Shine* (5), and inasmuch as the ground of each decision is the absence of consent by the woman, they can have no bearing on a case in which the consent of the woman was both implied by law and actually given. The decisions in cases in which possession has been obtained of women by men who have personated their husbands, or pretended to treat them medically, equally depend upon whether consent can or cannot be implied: *Reg.* v. *Barrow* (6); *Reg.* v. *Dee* (7); *Reg.* v. *Flattery* (8).

If the conviction is right, it appears to follow that any man who is accused by a prostitute of having defrauded or infected her may be prosecuted for an indecent assault, if not for rape.

(1) 1 Spink's Eccl. & Adm. 121.
(2) 8 Q. B. D. 54.
(3) 4 F. & F. 1105.
(4) 13 Cox, C. C. 28.
(5) 14 Cox, C. C. 124; C. A. 145.
(6) Law Rep. 1 C. C. R. 156.
(7) 14 L. R. Ir. 468.
(8) 2 Q. B. D. 410.

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Poland, (with him *C. W. Mathews*), for the prosecution. The prisoner is guilty on both counts. The argument against the conviction proceeds on an erroneous view of the obligation of a married woman. The passage cited from Hale's Pleas of the Crown is not supported by any other authority. It cannot be doubted that, if the prisoner had effected his purpose by force, the prosecutrix knowing his condition and resisting, the prisoner would have been guilty of rape. The act of the prisoner was therefore unlawful: see per Lord Stowell in *Popkin* v. *Popkin*. (1) The case states that the prosecutrix did not know her husband's condition, and that, had she known it, she would not have submitted. The prosecutrix, therefore, did not consent to the act of the prisoner, and in the absence of consent by her, his act was both an "unlawful and malicious infliction of grievous bodily harm" (s. 20), and an "assault inflicting actual bodily harm" (s. 47).

As to the authorities, *Reg.* v. *Bennett* (2) and *Reg.* v. *Sinclair* (3) are directly in favour of the prosecution. These cases have never been doubted in any English court. The observations made upon them by the Irish judges in *Hegarty* v. *Shine* (4) were not necessary to the decision, and Palles, C.B., in the Court of Appeal appears to have considered the ruling of Willes, J., in *Reg.* v. *Bennett* (2) correct. *Reg.* v. *Barrow* (5) is not binding on the Court. It was decided without argument, and the decision was questioned in *Reg.* v. *Flattery* (6); was not followed by the Irish Court in *Reg.* v. *Dee* (7), and has since been declared contrary to law by the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4. (8)

Forrest Fulton, in reply.

Cur. adv. vult.

(1) Cited in *Durant* v. *Durant*, 1 Hagg. Eccl. 765.

(2) 4 F. & F. 1105.

(3) 13 Cox, C. C. 28.

(4) 14 Cox, C. C. 124; C. A. 145.

(5) Law Rep. 1 C. C. R. 156.

(6) 2 Q. B. D. 410.

(7) 14 L. R. Ir. 468.

(8) By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4: "Whereas doubts have been entertained whether a man who induces a married woman to permit him to have connection with her by personating her husband, is or is not guilty of rape, it is hereby enacted and declared that every such offender shall be deemed to be guilty of rape."

WILLS, J. The prisoner in this case has been convicted (1) of "an assault" upon his wife "occasioning actual bodily harm," under 24 & 25 Vict. c. 100, s. 47, and (2) of "unlawfully and maliciously inflicting" upon her "grievous bodily harm" under s. 20 of the same statute.

The facts are that he was, to his knowledge, suffering from gonorrhœa, that he had marital intercourse with his wife without informing her of the fact, that he infected her, and that from such infection she suffered grievous bodily harm. The question is whether he was rightly convicted upon either count.

First, was he guilty of an assault? In support of a conviction it is urged that even a married woman is under no obligation to consent to intercourse with a diseased husband; that had the wife known that her husband was diseased she would not have consented; that the husband was guilty of a fraud in concealing the fact of his illness; that her consent was therefore obtained by fraud, and was, therefore, no consent at all, and as the act of coition would imply an assault if done without consent, he can be convicted.

This reasoning seems to me eminently unsatisfactory. That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent. In respect of a contract, fraud does not destroy the consent. It only makes it revocable. Money or goods obtained by false pretences still become the property of the fraudulent obtainer unless and until the contract is revoked by the person defrauded, and it has never been held that, as far as regards the application of the criminal law, the repudiation of the contract had a retrospective effect, or there would have been no distinction between obtaining money under false pretences and theft.

A second and far more effective way of stating the argument, however, is that connection with a diseased man and connection with a sound man are things so essentially different, that the wife's submission without knowledge of the facts is no consent

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at all. It is said that such a case rests upon the same footing with the consent to a supposed surgical operation, or to connection with a man erroneously supposed to be the woman's husband. In the latter case there has been great difference of judicial opinion as to whether it did or did not amount to the crime of rape, but as it certainly would now be rape by virtue of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 4, I treat it as so settled.

A third way of putting the case is that inasmuch as the act done amounts to legal cruelty according to the doctrines formerly of the Ecclesiastical Courts and now of the Divorce Court, it cannot be said to be within the consent implied by the marital relation.

These different ways of putting the argument in favour of a conviction have some important differences. According to each the consent of the marital relation does not apply to the thing done, a fact as to which there does not seem to be room for doubt, and according to each the want of it makes the transaction an assault. According to the first it is the fraudulent suppression of the truth which destroys the consent de facto given, a proposition involving as a necessary element in the offence the knowledge of his condition on the part of the offender. According to the second it is the difference between the thing supposed to be done and the thing actually done that negatives the idea of consent at all, and in that view it must be immaterial whether the offender knew that he was ill or not. According to the third, his knowledge is material not on the ground of fraudulent misrepresentation, but because it is an element in legal cruelty as that term is understood in the Divorce Court.

It makes a great difference upon which of these grounds a conviction is supported. Each of them covers an area vastly greatly than the ground occupied by the circumstances of the present case. If the first view be correct, every man, as has been pointed out, who knowingly gives a piece of bad money to a prostitute to procure her consent to intercourse, or who seduces a woman by representing himself to be what he is not, is guilty of assault, and, it seems to me, therefore, of rape. If the second view be correct, it applies in similar events just as much to unmarried

as to married people, unless the circumstances should establish that the parties were content to take their chances as to their respective states of health; and the allegation that the man had given an assurance to a prostitute before having intercourse with her that he was sound when he was not so in fact might be a ground for putting him upon his trial for rape. If the third view be correct, it places the married man, in the eye of the criminal law, in a much worse position than the unmarried, and makes him guilty of an assault and possibly of rape, where an unmarried man would not be liable to the same consequences. It may be said that from the moral point of view his case is the worse; but there are two sides to this as to most other questions. The man who goes out of his way to seek intercourse under such circumstances—and, be it remembered that the hypothesis I am now dealing with assumes knowledge of his condition on the part of the man, is without excuse. There may be many excuses for the married man suggested by the modes of life with which poverty and overcrowding have to do.

We are thus introduced, as it seems to me, to a set of very subtle metaphysical questions. If we are invited to apply the analogy of the cases in which a man has procured intercourse by personating a husband, or by representating that he was performing a surgical operation, we have to ask ourselves whether the procurement of intercourse by suppressing the fact that the man is diseased is more nearly allied to the procurement of intercourse by misrepresentation as to who the man is or as to what is being done, or to misrepresentation of a thousand kinds in respect of which it has never yet occurred to any one to suggest that intercourse so procured was an assault or a rape. There are plenty of such instances in which the knowledge of the truth would have made the victim as ready to accept the embraces of a man stricken with small-pox or leprosy. Take, for example, the case of a man without a single good quality, a gaol-bird, heartless, mean and cruel, without the smallest intention of doing anything but possessing himself of the person of his victim, but successfully representing himself as a man of good family and connections prevented by some temporary obstacle from contracting an immediate marriage, and with conscious hypocrisy acting the part

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of a devoted lover, and in this fashion, or perhaps under the guise of affected religious fervour, effecting the ruin of his victim. In all that induces consent there is not less difference between the man to whom the woman supposes she is yielding herself and the man by whom she is really betrayed than there is between the man bodily sound and the man afflicted with a contagious disease. Is there to be a distinction in this respect between an act of intercourse with a wife who on this special occasion would have had a right to refuse her consent, and certainly would have refused it had she known the truth, and the intercourse taking place under the general consent inferred from a bigamous marriage obtained by the false representation that the man was capable of contracting a legal marriage? In such a case the man can give no title of wife to the woman whose person he obtains by the false representation that he is unmarried, and by a ceremony which, under the circumstances, is absolutely void. Where is the difference between consent obtained by the suppression of the fact that the act of intercourse may produce a foul disease, and consent obtained by the suppression of the fact that it will certainly make the woman a concubine, and while destroying her status as a virgin withhold from her the title and rights of a wife? Where is the distinction between the mistake of fact which induces the woman to consent to intercourse with a man supposed to be sound in body, but not really so, and the mistake of fact which induces her to consent to intercourse with a man whom she believes to be her lawful husband but who is none? Many women would think that of two cruel wrongs the bigamist had committed the worse.

These are but specimens of the questions which must be faced before the circumstances of the present case can be pronounced to constitute an assault; and such considerations lead one to pause on the threshold, and inquire whether the enactment under consideration could really have been intended to apply to circumstances so completely removed from those which are usually understood when an assault is spoken of, or to deal with matters of any kind involving the sexual relation or act.

The description of the offence constituted by s. 47 is as follows: "whoever shall be convicted of an assault occasioning

actual bodily harm." The section is the last of a group of twelve, headed "assaults." None of them, except s. 43, implies that any distinction between males and females is thought of, and that section points to nothing of a sexual character. It merely provides that in cases of assaults upon males under fourteen, and upon females generally, if the assault or battery is of such an aggravated character that it cannot in the opinion of the justices be sufficiently punished as a common assault or battery, it shall be lawful for them to inflict a heavier punishment. Indecent assaults as such, upon females are dealt with by s. 52; and upon males by s. 62; and there is, therefore, no ground for supposing that anything specially between the sexes is pointed at either by this section or any of those in the group to which it belongs.

The next group of eight sections (48-55) is headed, "rape, abduction, and defilement of women," and deals specially with sexual crimes. Surely this was the place in which to find an enactment dealing with the very peculiar circumstances now before us, and it cannot really have been intended that they should be embraced by a section whose terms are applicable to, and, as it seems to me, satisfied by, the class of cases which would naturally occur to one's mind—those of direct violence.

The worst of the contagious diseases of this class has, I believe, been known in this country for close upon four centuries. The circumstances which have happened in this case cannot have been of infrequent occurrence during that interval, and cannot have failed justly to give rise to the bitterest resentment. It seems to my mind a very cogent argument against the conviction that, if the view of the law upon which it is founded be correct, thousands of offending husbands, and as I think also of offending wives, must have rendered themselves amenable to the criminal law; and yet it was for the year 1866, *when R.* v. *Bennett* (1) was decided, to discover that such transgressors might have been indicted and criminally dealt with during all that long period. It is true that women take a different place in social position, and have by Act of Parliament many rights, and by common usage much social liberty which no one would have claimed for

(1) 4 F. & F. 1105.

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them centuries ago. This fact, however, seems to me a strangely insufficient reason for a new reading of the criminal law fraught with consequences which no one can deny to be of a very serious and wide-spread character.

The principle upon which a conviction in this case must be upheld will or will not apply to the intercourse of unmarried, as well as of married men and women, according to the ground or grounds selected upon which to justify it. If it is based upon the notion of cruelty as understood in the Divorce Court, the case of the unmarried man and woman falls without its purview. If suppression of the truth be a material element in the inquiry, actual misrepresentation on the subject of health would put an unmarried man or woman in the same position as the married man or woman who conceals that fact against which the married state ought to be a sufficient guarantee. I intentionally refer to women as well as men, for it is a great mistake to look at questions of this kind as if sexual faults and transgressions were all on the side of one sex. The unmarried woman who solicits and tempts a perhaps reluctant man to intercourse which he would avoid like death itself if he knew the truth as to her health, must surely, under some circumstances at least, come under the same criminal liability as the man. If, again, the conviction be upheld on the ground of the difference between the thing consented to and the thing done, the principle will extend to many, perhaps most cases, of seduction, and to other forms of illicit intercourse, including, at least theoretically, the case of prostitution; and if such difference be the true ground upon which to base a confirmation of the conviction, knowledge of his or her condition on the part of the person affected is immaterial. It is the knowledge or want of knowledge on the part of the person who suffers from contagion alone that is the material element. Surely these considerations point to the conclusion that a wide door will be opened to inquiries not of a wholesome kind, in which the difficulties in the way of arriving at truth are often enormous, and in which the danger of going wrong is as great as it is by people in general inadequately appreciated. A new field of extortion may be developed, and very possibly a fresh illustration afforded of the futility of trying

to teach morals by the application of the criminal law to cases occupying the doubtful ground between immorality and crime, and of the dangers which always beset such attempts.

Of course if by legislation such cases should be brought within the criminal law, all we shall have to do will be to face the difficulties and do our best to administer the law. It seems to me, however, that such an extension of the criminal law to a vast class of cases with which it has never yet professed to deal is a matter for the legislature, and the legislature only. I understand the process of expansion by which the doctrines of the common law are properly made by judicial construction to apply to altered modes of life and to new circumstances, and results thus legitimately brought about which would have startled our ancestors could they have foreseen them. I do not understand such a process, and I do not think it legitimate, when every fact and every circumstance which goes to constitute the alleged offence is identical with what it has been for many hundreds of years past. Whether further legislation in this direction is desirable is a question for legislators rather than lawyers, and the only remark that I desire to make upon this subject is that apart from cases of actual violence and of children so young that the very fact of touching them in the way of sexual relation may fairly be treated as a crime, the mysteries of sexual impulses and intercourse are well nigh insoluble, and the difficulty of arriving at the truth in the case of imputed misconduct is enormous; and I doubt whether they can be thoroughly appreciated without the experience gained by trying cases of intercourse with girls near the age of sixteen; and they certainly suggest the necessity of the utmost care in dealing by way of legislation with the subject under discussion.

If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, unless, indeed, as between married persons rape is impossible, a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority. As between unmarried people this qualification will not apply. I cannot understand why, as a general rule, if intercourse be an assault, it should not be a rape. To separate the act into two

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portions, as was suggested in one of the Irish cases, and to say that there was consent to so much of it as did not consist in the administration of an animal poison, seems to me a subtlety of an extreme kind. There is, under the circumstances, just as much and just as little consent to one part of the transaction as to the rest of it. No one can doubt that in this case had the truth been known there would have been no consent to even a distant approach of it. I greatly prefer the reasoning of those who say that because the consent was not to the act done, the thing done is an assault. If an assault—a rape also, as it appears to me. I am well aware of the respect due to the opinion of the very learned judges from whom I differ; but I cannot help saying that to me it seems a strange misapplication of language to call such a deed as that under consideration either a rape or an assault. The essence of a rape is, to my mind, the penetration of the woman's person without her consent. In other words it is, roughly speaking, where the woman does not intend that the sexual act shall be done upon her either at all, or, what is pretty much the same thing, by the particular individual doing it, and an assault which includes penetration does not seem to me under such circumstances to be anything but rape. Of course the thing done in the present case is wicked and cruel enough. No one wishes to say a word in palliation of it. But that seems to me to be no reason for describing it as something else than it is, in order to bring within the criminal law an act which up to a very recent time no one ever thought was within it. If coition, under the circumstances in question, be an assault, and if the reason why it is an assault depends in any degree upon the fact that consent would have been withheld if the truth had been known, it cannot the less be an assault because no mischief ensues to the woman, nor indeed where it is merely uncertain whether the man be infected or not. For had he disclosed to the woman that there *might* be the peril in question, she would, in most cases other than that of mere prostitution, have refused her consent, and it is, I should hope, equally true that a married woman, no less than an unmarried woman, would be justified in such a refusal. In all such cases therefore, apart from the suggested impossibility of rape upon a wife, rape must be committed,

and a great many rapes must be constantly taking place without either of the parties having the least idea of the fact.

The question raised is of very wide application. It does not end with the particular contagion under consideration, but embraces contagion communicated by persons having small-pox or scarlet fever, or other like diseases quite free from the sexual element, and whilst so afflicted coming into a personal contact with others, which would certainly have been against the will of those touched had they known the truth. This species of assault, if assault it be, must have been of much longer standing than the four centuries I have alluded to, and it involves no considerations depending upon the social status of women. Yet no one has ever been prosecuted for an assault so constituted. But upon this point I desire only to express my concurrence in the observations of my brother Stephen, which I have had the opportunity of reading.

I wish to observe that if an assault can be committed by coition to which consent has been procured by suppression of the truth or misrepresentation as to the state of health of one of the parties questions of the kind I have indicated may be tried at petty sessions. The observation is not, of course, conclusive; but it is well to appreciate whither a conviction in the present case might lead us, not only as regards the subject-matter of the criminal law, but as to the tribunals which will have to administer it.

When the Act of 1861 (24 & 25 Vict. c. 100) was passed it had never occurred to any human being, so far as our legal history affords any clue, that the circumstances now under consideration constituted an assault. The term is as old as any in our law, but it had never been so applied. The doctrine owes its origin to the remarks of Willes, J., at the Taunton Assizes held in 1866, and reported in *R.* v. *Bennett.* (1) It was pointed out in the first case of *Hegarty* v. *Shine* (2) that the conviction might be upheld on the ground that the girl was, as she alleged, asleep when intercourse took place, and therefore gave no consent. In spite of all my respect for everything that fell from the lips of that very great lawyer, I am compelled to think that it was a case in which he strained the law for the purpose of punishing a

(1) 4 F. & F. 1105.

(2) 2 L. R. Ir. 273; C. A. 4 L. R. Ir. 288.

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great wrong, and I confess myself unable to follow his view that the thing done in that case might be an assault and yet not a rape. Were it, however, possible that the mere words of the section would apply to the transaction in question, and that it were capable of being described as an assault, I am still of opinion that the context shews that sexual crimes were intended to be dealt with as a class by themselves, the only rational way of legislating upon such a subject, and if the letter of the section could be satisfied by the present circumstances, there never was a case to which the maxim, "qui hæret in literâ hæret in cortice," more emphatically applied.

I proceed to inquire whether the conviction under s. 20 can be supported. That section says, "Whoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, with or without any weapon or instrument, shall be guilty of a misdemeanour," &c. Whilst of opinion that it is not every breach of moral duty that will satisfy the term "unlawfully," I am clearly of opinion that an act which would give a right to a judicial separation is abundantly sufficient to answer to it. I am also of opinion than an unlawful act done wilfully and intentionally, and without any circumstances to justify it and take away its primâ facie character of unlawfulness, is "malicious" within the meaning of the section. But I think the section clearly points to the infliction of direct and intentional violence, whether with a weapon, or the fist, or the foot, or any other part of the person, or in any other way not involving the use of a weapon, as, for instance, by creating a panic at a theatre whereby people trampled upon one another: *Reg.* v. *Martin.* (1) The prisoner in that case did what was certain to make people crush one another, perhaps to death, and the grievous bodily harm was as truly inflicted by him as if he had hurled a stone at somebody's head. Take also the illustration of my brother Stephen, of a man who digs a pit for another to fall into, whereby that other is injured. I do not think this section was ever intended to apply to the administration of poison, and most of the arguments I have used to shew that sexual offences were not intended to be dealt with in s. 47 apply with equal force to

(1) 8 Q. B. D. 54.

s. 20. The Court for the consideration of Crown Cases Reserved in *Reg.* v. *Taylor* (1) decided that in the offence of "unlawfully and maliciously inflicting grievous bodily harm" an assault is necessarily included. So far as that decision is concerned, the same question may be said to arise under s. 20 as under s. 47. But I think the argument is even stronger here, for the context seems to me to shew that direct personal violence of some kind was intended, so that even if the constructive assault contended for by those who support a conviction under s. 47 were established, a conviction under this section would still be wrong.

I am of opinion, therefore, that the conviction should be quashed.

A. L. SMITH, J. In my judgment this conviction cannot be supported. I have had the opportunity of reading the judgment of my brother Stephen, and I agree in it and in his reasons. There is one point I wish to add which also appears to me to shew that this conviction is erroneous.

At marriage the wife consents to the husband exercising the marital right. The consent then given is not confined to a husband when sound in body, for I suppose no one would assert that a husband was guilty of an offence because he exercised such right when afflicted with some complaint of which he was then ignorant. Until the consent given at marriage be revoked, how can it be said that the husband in exercising his marital right has assaulted his wife? In the present case at the time the incriminated act was committed, the consent given at marriage stood unrevoked. Then how is it an assault?

The utmost the Crown can say is that the wife would have withdrawn her consent if she had known what her husband knew, or, in other words, that the husband is guilty of a crime, viz., an assault, because he did not inform the wife of what he then knew. In my judgment in this case, the consent given at marriage still existing and unrevoked, the prisoner has not assaulted his wife.

As to the unlawfully and maliciously inflicting grievous bodily harm, it appears to me that this offence cannot be committed unless an assault has in fact been committed, and indeed this has

(1) Law Rep. 1 C. C. R. 194.

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been so held; and, inasmuch as in my judgment in this case no assault has been committed the graver offence equally has not been committed.

MATHEW, J. I am of opinion that this conviction should be quashed. I agree with the judgment of my brother Stephen.

STEPHEN, J. The question in this case is whether a man who knows that he has gonorrhœa, and who by having connection with his wife, who does not know it, infects her, is or is not guilty of an offence either under s. 20 of 24 & 25 Vict. c. 100, or under s. 47 of the same Act. Sect. 20 punishes everyone who "unlawfully and maliciously inflicts any grievous bodily harm upon any other person." Sect. 47 punishes everyone who is convicted of "an assault occasioning actual bodily harm to any person."

Before discussing in detail the meaning of these words I will make one general observation. The present case is the first, so far as appears, in which any person has ever been indicted, or at all events convicted, of any offence whatever for infecting another with a disease of any kind, although diseases of this kind are unhappily common and legislation in reference to them has taken place. The legislation in question is contained in 29 Vict. c. 35, and some other Acts which amend it. These Acts were repealed in 1886. They authorized the detention in hospitals of diseased women under certain circumstances, but they contained nothing to suggest that the communication of the disease was in itself a crime. If such had been the case the Acts in question would probably have been made supplementary to the ordinary administration of criminal justice.

If the present conviction is right it must be so on some principle which would apply to women as well as to men and to unmarried women as well as to wives. Sect. 47 indeed could hardly apply to women, but s. 20 would make no distinction between the sexes. It is also, I think, clear that, unless some distinction can be pointed out which does not occur to me, the sections must be held to apply, not only to venereal diseases, but to infection of every kind which is in fact communicated by one person to another by any act likely to produce it. A man who knowing that he has scarlet fever or small-pox shakes hands with

a friend and so infects him may be said to fall under s. 20 or s. 47 as much as the prisoner in this case. To seize a man's hand without his consent is an assault; but no one would consent to such a grasp if he knew that he risked small-pox by it, and if consent in all cases is rendered void by fraud, including suppression of the truth, such a gesture would be an assault occasioning actual bodily harm as much as the conduct of the prisoner in this case.

Not only is there no general principle which makes the communication of infection criminal, but such authority as exists is opposed to such a doctrine in relation to any disease. The following are the authorities on this subject. By 1 Jac. 1, c. 31, s. 7, it was made felony for any person who had under other provisions of the Act been commanded to keep his house "to go abroad and converse in company having any infectious sore upon him uncured." Upon this Hale (1 P. C. 432) remarks that the statute is now discontinued, and he adds: "But what if such person goes abroad to the intent to infect another, and another is thereby infected and dies? Whether this be not murder by the common law might be a question, but if no such intention evidently appears, though de facto by his conversation another be infected, it is no felony by the common law, though it be a great misdemeanour, and the reasons are: (1) because it is hard to discern whether the infection arise from the party or from the contagion of the air. It is God's arrow, &c. (2) Nature prompts every man in what condition soever to preserve himself, which cannot be well without mutual conversation. (3) Contagious diseases, as plague, pestilential fevers, small-pox, &c., are common among mankind by the visitation of God, and the extension of capital punishments in cases of this nature would multiply severe punishments too far and give too great latitude and loose to severe punishments." Some of the expressions in this passage would scarcely be employed now, but it may be taken as a caution against wide and uncertain extensions of the criminal law, and as a distinct proof that Hale did not regard the transmission of disease as an ordinary case of the infliction of bodily harm. His statement that, though not a felony, it would be a great misdemeanour at common law to infect another unintentionally by going

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about with a plague sore may at first sight appear to favour the maintenance of the conviction in this place, but it is I think explained and its generality is limited by *Rex* v. *Vantandillo*. (1) It was held in that case to be an indictable misdemeanour to carry a child which had the small-pox along a street, and the passage from Lord Hale was the principal authority relied upon. The offence referred to by Lord Hale is therefore the offence of committing a public nuisance, and his authority is opposed rather than favourable to the notion that to infect another with a contagious disease is in the nature of an offence against the person. The provisions of the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 120 to 130, and in particular s. 126, treats offences by spreading infection in the same way. By that section an infected person who without proper precautions exposes himself in any street, &c., is liable to a penalty of 5*l*. These considerations make it antecedently improbable that the abominable conduct of which the prisoner has been convicted should be in the strict legal sense of the word a crime.

I now come to the construction of the precise words of the statute.

Sect. 20 punishes "every one who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person either with or without any weapon or instrument." It is said upon s. 20 that the prisoner did not act "unlawfully," because he had by law a right to have intercourse with his wife. It is said in answer to this that he did act unlawfully, because his right ceased when he knew himself to be suffering under the disease which he communicated, and because the word "unlawfully" must here be construed to mean "unlawfully" in the wide general sense in which the word is used with reference to acts which if done by conspirators are indictable, though not if they are done by individuals. This general sense may, I think, be said to be "immoral and mischievous to the public." I do not agree with the doctrine that the word "unlawfully" is used here in this wide sense. The use of the word in relation to conspiracy appears to me to be exceptional. I think that no act can for this purpose be regarded as unlawful merely because

(1) 4 M. & S. 73.

it is immoral. It must, I think, be forbidden by some definite law; but I pass this over, for I think that, in this case, the word "unlawfully" applies, because the act done is forbidden by the law relating to marriage, according to which it constitutes cruelty, and is as such a cause for a judicial separation, whilst it is strong evidence of adultery, which coupled with cruelty would be a ground for a complete divorce. The word "maliciously" obviously applies. But is there an "infliction of bodily harm either with or without any weapon or instrument"? I think there is not, for the following reasons.

The words appear to me to mean the direct causing of some grievous injury to the body itself with a weapon, as by a cut with a knife, or without a weapon, as by a blow with the fist, or by pushing a person down. Indeed, though the word "assault" is not used in the section, I think the words imply an assault and battery of which a wound or grievous bodily harm is the manifest immediate and obvious result. This is supported by *Reg.* v. *Taylor* (1), in 1869, in which it was held that a prisoner could upon an indictment under that section be convicted of a common assault, because each offence, "wounding" and "inflicting grievous bodily harm," "necessarily includes an assault," though the word does not occur in the section. It is further illustrated by reference to the 14 & 15 Vict. c. 19, s. 4, of which the present section is a re-enactment. Sect. 4 of the earlier Act begins with the preamble, "And whereas it is expedient to make further provision for the punishment of aggravated assaults," and then proceeds in the words of the present section, with a trifling and unimportant difference in their arrangement.

Infection by the application of an animal poison appears to me to be of a different character from an assault. The administration of poison is dealt with by s. 24, which would be superfluous if poisoning were an "infliction of grievous bodily harm either with or without a weapon or instrument." The one act differs from the other in the immediate and necessary connection between a cut or a blow and the wound or harm inflicted, and the uncertain and delayed operation of the act by which infection is

(1) Law Rep. 1 C. C. R. 194.

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communicated. If a man by a grasp of the hand infects another with small-pox, it is impossible to trace out in detail the connection between the act and the disease, and it would, I think, be an unnatural use of language to say that a man by such an act "inflicted" small-pox on another. It would be wrong in interpreting an Act of Parliament to lay much stress on etymology, but I may just observe that "inflict" is derived from "infligo," for which, in Facciolati's Lexicon three Italian and three Latin equivalents are given, all meaning "to strike," viz. "dare, ferire and percuotere" in Italian, and "infero, impingo and percutio' in Latin.

There is authority for the proposition that poisoning is not an assault, though in the case of *Reg.* v. *Button* (1), in 1838, Serjeant Arabin, after consulting the Recorder of London, Mr. Law, held that it was. In *Reg.* v. *Dilworth* (2), in 1843, a man was indicted for administering poison with intent to murder, and it was suggested that if the intent was not made out the prisoner might be convicted under 1 Vict. c. 85, of a common assault, as it was involved in the charge, and *Reg.* v. *Button* (1) was cited, but Coltman, J., said that he disagreed with *Reg.* v. *Button* (1), and that the prisoner must either be convicted or acquitted of the whole charge. In *Reg.* v. *Hanson* (3), in 1849, Vaughan Williams, J., after consulting Cresswell, J., held that the administration of cantharides was neither a common assault nor a common law misdemeanour; and *Reg.* v. *Walkden* (4) was a decision to the same effect by Parke, B. Upon these grounds I am of opinion that s. 20 does not apply to the case.

Is the case, then, within s. 47, as "an assault occasioning actual bodily harm"? The question here is whether there is an assault. It is said there is none, because the woman consented, and to this it is replied that fraud vitiates consent, and that the prisoner's silence was a fraud. Apart altogether from this question, I think that the act of infection is not an assault at all, for the reasons already given. Infection is a kind of poisoning. It is the application of an animal poison, and poisoning, as already shewn, is not an assault. Apart, however, from this, is the man's

(1) 8 C. & P. 660.
(2) 2 Mo. & Ro. 531.
(3) 2 C. & K. 912.
(4) 1 C. C. C. 282.

concealment of the fact that he was infected such a fraud as vitiated the wife's consent to his exercise of marital rights, and converted the act of connection into an assault? It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true. If we apply it in that sense to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent; and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance by promises not intended to be fulfilled. These illustrations appear to shew clearly that the maxim that fraud vitiates consent is too general to be applied to these matters as if it were absolutely true. I do not at all deny that in some cases it applies, though it is often used with reference to cases which do not fall within it. For instance, it has nothing to do with such cases as assaults on young children. A young child who submits to an indecent act no more consents to it than a sleeping or unconscious woman. The child merely submits without consenting. The only cases in which fraud indisputably vitiates consent in these matters are cases of fraud as to the nature of the act done. As to fraud as to the identity of the person by whom it is done, the law is not quite clear. In *Reg.* v. *Flattery* (1), in which consent was obtained by representing the act as a surgical operation, the prisoner was held to be guilty of rape. In the case where consent was obtained by the personation of a husband, there was before the passing of the Criminal Law Amendment Act of 1885 a conflict of authority. The last decision in England, *Reg.* v. *Barrow* (2), decided that the act was not rape, and *Reg.* v. *Dee* (3), decided in Ireland in 1884, decided that it was. The Criminal Law Amendment Act of 1885 "declared and enacted" that thenceforth it should be deemed to be rape, thus favouring the view taken in *Reg.* v.

(1) 2 Q. B. D. 410. (2) Law Rep. 1 C. C. R. 158.
(3) 14 L. R. Ir. 468.

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Dee. (1) I do not propose to examine in detail the controversies connected with these cases. The judgments in the case of *Reg.* v. *Dee* (1) examine all of them minutely, and I think they justify the observation that the only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act. There is abundant authority to shew that such frauds as these vitiate consent both in the case of rape and in the case of indecent assault. I should myself prefer to say that consent in such cases does not exist at all, because the act consented to is not the act done. Consent to a surgical operation or examination is not a consent to sexual connection or indecent behaviour. Consent to connection with a husband is not consent to adultery.

I do not think that the maxim that fraud vitiates consent can be carried further than this in criminal matters. It is commonly applied to cases of contract, because in all cases of contract the evidence of a consent not procured by force or fraud is essential, but even in these cases care in the application of the maxim is required, because in some instances suppression of the truth operates as fraud, whereas in others at least a suggestion of falsehood is required. The act of intercourse between a man and a woman cannot in any case be regarded as the performance of a contract. In the case of married people that act is part of a great relation based upon the greatest of all contracts, but standing on a footing peculiar to itself. In all other cases the immorality of the act is inconsistent with any contract relating to it. Thus in no case can considerations relating to contract apply to it. The effect of fraud upon a contract is to render it voidable at the option of the party defrauded. This clearly cannot apply to sexual intercourse. It is either criminal if the woman does not consent, or if her consent is obtained by certain kinds of fraud, or it is, as this was, a breach of matrimonial duty, or it is not criminal at all.

The woman's consent here was as full and conscious as consent could be. It was not obtained by any fraud either as to the nature of the act or as to the identity of the agent. The injury

(1) 14 L. R. Ir. 468.

done was done by a suppression of the truth. It appears to me to be an abuse of language to describe such an act as an assault. It is not stated at what interval after December 20 the disease shewed itself, but there must have been some interval during which it was uncertain whether infection had been communicated or not. During this interval was the man guilty or not? If he was, it seems extraordinary to say that he had committed an assault from which an event which was not in his power could set him free. If he was not, it seems to me equally strange to say that he could be deprived of his innocence by such an event. In some instances no doubt such an interval might elapse. If a man laid a trap for another into which he fell after an interval, the man who laid it would during the interval be guilty of an attempt to assault, and of an actual assault as soon as the man fell in. In the case of death inflicted by violence, the criminal might at first be guilty of an assault or an unlawful wounding, and his crime would become murder or manslaughter on the death of the person wounded, but in the case of an attempt the intention to consummate the crime exists from the first, and in the case of murder, the act which ultimately becomes murder is in itself a crime whether death ensues or not. In this case there was no intention, and therefore no attempt to infect, and it seems anomalous to make a consequence which, though highly probable, was neither intended nor necessary, relate back on its occurrence in such a way as to turn an act not punishable itself into a crime.

Two authorities were quoted to shew that such an act as this is a crime. They are *Reg.* v. *Bennett* (1), in which Willes, J., decided in 1866 that a man who infected his niece, a girl of thirteen, might be convicted of an indecent assault, though she consented to sleep with him, and *Reg.* v. *Sinclair* (2), in which this decision was followed in 1867 by Shee, J. The case of *Reg.* v. *Bennett* (1) was disapproved of in *Hegarty* v. *Shine* (3), though, as the Irish Courts point out, the verdict may possibly have been justified by the facts as proved, the girl having sworn that she was asleep and could not say what happened to her. If this was

(1) 4 F. & F. 1105. (2) 13 Cox, C. C. 28.
(3) 2 L. R. Ir. 273; 4 L. R. Ir. 288.

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believed there was evidence of indecent assault, at least, if not of rape. *Reg.* v. *Sinclair* (1) was decided on the authority of *Reg.* v. *Bennett.* (2)

For these reasons I think there was no assault in the present case, and that therefore it does not fall within s. 20.

I wish to observe on a matter personal to myself that I was quoted as having said in my Digest of the Criminal Law that I thought a husband might under certain circumstances be indicted for rape on his wife. I did say so in the first edition of that work, but on referring to the last edition (p. 124, note), it will be found that that statement was withdrawn.

I think that this conviction should be quashed. No one can doubt the abominable nature of the prisoner's conduct, but if it is to be treated as a crime it must, I think, be done upon express statutory authority. The whole matter is surrounded with difficulties with which the legislature alone is competent to deal, and to which it would be out of place to refer.

I am informed that my brother Grantham agrees with this judgment.

HAWKINS, J. I am of opinion that the prisoner was rightly convicted upon both counts of the indictment. The first count was framed under s. 20 of 24 & 25 Vict. c. 100, and charged the prisoner with "unlawfully and maliciously inflicting grievous bodily harm" upon Selina Clarence. The second count was framed under s. 47 of the some Act and charged him with an "assault" upon the said Selina Clarence "occasioning" her "actual bodily harm." At the time of committing of the offences charged, Selina Clarence was and still is the wife of the prisoner. At that time the prisoner was suffering from gonorrhœa as he knew, but his wife was ignorant of the fact. In this condition of things the prisoner had sexual intercourse with his wife and in so doing communicated to her his disease and thereby caused her grievous bodily harm. It must also be taken as a fact that had the prisoner's wife known he was so suffering she would have refused to submit to such intercourse.

On the prisoner's behalf it was contended that the conviction

(1) 13 Cox, C. C. 28. (2) 4 F. & F. 1105.

was wrong upon several grounds: first, that the injury caused to the wife was the result of a lawful act, viz. the sexual communion of a husband with his wife: secondly, that the charge in the first count involved, and that in the second count was based on, an assault, and that no assault could be committed by a husband in merely exercising his marital right upon the person of his wife: and, thirdly, that the sections of the statute under which the indictment was framed had no application to such circumstances as those above-mentioned.

About the unlawfulness and maliciousness of the prisoner's conduct it seems to me impossible to raise a doubt. It has long been established by authority that if a husband knowingly communicates to his wife a venereal disease, such misconduct amounts to legal cruelty and is ground for a judicial separation; and in the absence of evidence to the contrary it may be presumed that a man suffering under venereal disease knows it, and knows also that if he has communion with his wife he will in all human probability communicate his malady to her: see *Brown* v. *Brown*. (1) It is equally clear that wilfully to do an unlawful act to the prejudice of another is to do it maliciously. We have, then, these elements established, grievous bodily harm unlawfully and maliciously caused. To complete the offence, according to the language of s. 20, it is only necessary to prove that such injury was "inflicted" by the prisoner within the meaning of that word as used in s. 20.

For the prisoner it was contended that bodily harm cannot legally be said to be "*inflicted*" unless it has been brought about by some act amounting to an assault, and that there was no evidence of any assault in the present case. I think both these contentions untenable, and that the first count may be supported even assuming no assault to have been proved. I think, moreover that an assault was proved. I will, however, defer what I have to say upon that point until I come to deal with the second count.

With reference to the question whether it was necessary to prove an assault in order to establish the first count, it may be, though I do not say it is so, that some support is afforded to the argument of the prisoner's counsel if the word "inflict" is read

(1) Law Rep. 1 P. & D. 46.

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only according to its strict etymological interpretation. I am aware also that the argument has the support of the dictum of Kelly, C.B., in delivering the judgment of the Court in *Reg.* v. *Taylor*. (1) In that case the prisoner was indicted in one count for unlawfully wounding, and in another for "unlawfully and maliciously inflicting grievous bodily harm." The jury found him guilty of "an assault" and the conviction was affirmed, the Lord Chief Baron saying, "each of the counts is for an offence which necessarily includes an assault." With reference to this dictum it will be seen at a glance that it was not at all essential for the judgment, inasmuch as the conviction for an assault might be supported if either count involved an assault, which the count for wounding most unquestionably did. I feel therefore at liberty respectfully to dissent from that dictum so far as it applied to the count for "inflicting grievous bodily injury," and I do so with the more confidence because I do not find it supported by any later authority.

In my opinion the legislature in framing the various sections of the statute already and hereafter referred to, used the words "inflict," "cause," and "occasion" as synonymous terms for the following among other reasons. Let me begin by calling attention to the language of the 18th section, which runs thus: "whosoever shall unlawfully and maliciously by any means whatsoever wound or '*cause*' any grievous bodily harm to any person, &c., with intent, &c., shall be guilty of felony." If the prisoner had been indicted under this section, could anybody doubt that upon proof of his intention to cause the grievous bodily harm he in fact occasioned, he would have fallen within not only the spirit but the precise language of the section according to the strictest interpretation which could be applied to it? I next ask myself what was the object of the 20th section? Clearly it was to provide for cases in which the grievous bodily harm mentioned in s. 18, though unlawfully and maliciously caused, was unaccompanied by the felonious intent, which is the aggravating feature of the felony created by that section, and accordingly s. 20 made such last-mentioned offence a misdemeanour only, by enacting as follows, "whosoever shall unlawfully or maliciously

(1) Law Rep. 1 C. C. R. 195.

wound or *inflict* any grievous bodily harm upon any other person either with or without any weapon or instrument shall be guilty of a misdemeanour." Surely the object of these two sections could only have been to make the doing of grievous bodily harm with intent, a felony, without intent, a mere misdemeanour, and to hold that no man could be convicted under s. 20 without proof of an assault would practically amount to holding that maliciously to do grievous bodily harm to another without felonious intent is unpunishable, unless such harm is done through the medium of an assault. It is impossible the legislature could have intended this.

I must refer now to s. 47, which enacts that "whosoever shall be convicted upon an indictment of an assault" occasioning "actual bodily harm, shall be liable, &c." Here it will be observed that where the legislature intends that an assault shall be the foundation of the offence, it says so in express terms. If in using the word "inflict" in s. 20 it had intended that it should be interpreted as "cause by means of an assault," s. 47 would have been superfluous; for by merely substituting the word "actual" for "grievous" in s. 20, the whole object of both sections would have been attained; for the punishment awarded in each is the same, and "actual" harm of necessity includes "grievous" harm, and if for any reason, which I am unable to discover, the legislature had thought fit to separate the two sections, applying one to an assault causing "grievous," the other to an assault causing "actual," bodily harm, I should at least have expected it to use the same phraseology in each. If, on the other hand, it intended the 20th section to bear the construction I put upon it, I should expect to find that which I do, viz. difference in the language.

As the sections now stand, construing them as I do, it looks as if the framers of the Act intended, as I think they did, that where grievous bodily harm was maliciously caused by *any* means, the offender should be liable to a punishment of three years' penal servitude, and that the same punishment might follow upon a conviction for occasioning any actual injury, though short of that which could be termed "grievous," if such injury was caused by an assault.

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I am not without authority for the view I have expressed upon this part of the case. By s. 23 of the same Act it is enacted that "whosoever shall unlawfully, &c., administer to or cause to be administered to, or taken by any other person, any poison or other destructive or noxious thing, so as thereby to *inflict* upon any such person any grievous bodily harm, shall be guilty of felony." Now clearly there may be an administering, or a causing of poison, &c., to be taken so as to inflict harm under that section without even the semblance of an assault: see *Reg.* v. *Dilworth and Smith* (1), per Coltman, J., and note (b) to the case. See, also, *Reg.* v. *Wilson* (2), where, upon the trial of an indictment under a section similar to s. 58 of the same Act, the prisoner was charged with administering or causing to be taken by a woman a noxious drug with intent to procure her miscarriage, it was proved that the prisoner had procured the drug and given it to the woman *at her own request*, and she had taken it in his absence, it was held that he might be convicted of causing it to be taken. Under such circumstances no one could say the prisoner had committed an assault in procuring and handing the drug to the woman in compliance with her request.

These considerations lead me to the conclusion that the word "inflict" when used in the statute was not intended to be construed as involving an assault, whatever may be its strict etymological interpretation, as to which I do not think it necessary to enter upon a discussion. See, also, *Reg.* v. *Martin* (3), where the prisoner was convicted upon an indictment under s. 20 of "inflicting grievous bodily harm," under circumstances which it would be difficult to say amounted to an assault. It is right, however, to say that the point under consideration was not raised in that case, although it is unlikely to have escaped the attention of the four astute judges by whom, with myself, that case was decided.

I proceed now to consider the question whether there was, in fact, an assault by the prisoner on his wife occasioning her either grievous or actual bodily harm. I answer this question, also, in the affirmative.

(1) 2 M. & R. 534. (2) D. & B. C. C. 127.
(3) 8 Q. B. D. 54.

By the marriage contract a wife no doubt confers upon her husband an irrevocable privilege to have sexual intercourse with her during such time as the ordinary relations created by such contract subsist between them. For this reason it is that a husband cannot be convicted of a rape committed by him upon the person of his wife. But this marital privilege does not justify a husband in endangering his wife's health and causing her grievous bodily harm, by exercising his marital privilege when he is suffering from venereal disorder of such a character that the natural consequence of such communion will be to communicate the disease to her. Lord Stowell in *Popkin* v. *Popkin*, cited in *Durant* v. *Durant* (1), said, "the husband has a right to the person of his wife, but not if her health is endangered." So to endanger her health and cause her to suffer from loathsome disease contracted through his own infidelity, cannot, by the most liberal construction of his matrimonial privilege, be said to fall within it; and although I can cite no direct authority upon the subject, I cannot conceive it possible seriously to doubt that a wife would be justified in resisting by all means in her power, nay, even to the death, if necessary, the sexual embraces of a husband suffering from such contagious disorder.

In my judgment wilfully to place his diseased person in contact with hers without her express consent amounts to an assault. It has been argued that to hold this would be to hold that a man who suffering from gonorrhœa has communion with his wife might be guilty of the crime of rape. I do not think this would be so. Rape consists in a man having sexual intercourse with a woman without her consent, and the marital privilege being equivalent to consent given once for all at the time of marriage, it follows that the *mere act of sexual communion is lawful*; but there is a wide difference between a simple act of communion which *is lawful*, and an act of communion *combined with infectious contagion* endangering health and causing harm, which *is unlawful*. It may be said that assuming a man to be diseased, still as he cannot have communion with his wife without contact, the communication of the disease is the result of a lawful act, and, therefore, cannot be criminal. My reply to this argument is that if a

(1) 1 Hagg. Eccl. Rep. 767.

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person having a privilege of which he may avail himself or not at his will and pleasure, cannot exercise it without at the same time doing something not included in this privilege and which is unlawful and dangerous to another, he must either forego his privilege or take the consequences of his unlawful conduct. I may further illustrate my view upon this part of the case by applying by way of test to an indictment for assault the old form of civil pleadings. Thus: Indictment for an assault: Plea of justification, that the alleged assault was the having sexual communion with the prosecutrix she being the prisoner's wife: New assignment, that the assault charged was not that justified in the plea but the unlawful and malicious bringing of her person into contact with dangerous and contagious disease. What possible justification could be pleaded or answer given to such new assignment?

I ought perhaps to state that even if to hold a husband liable for an assault under such circumstances would be to subject him also to a charge of rape, the opinion I have above expressed would not be changed. No jury would be found to convict a husband of rape on his wife except under very exceptional circumstances, any more than they would convict of larceny a servant who stealthily appropriated to her own use a pin from her mistress's pincushion. I can, however, readily imagine a state of circumstances under which a husband might deservedly be punished with the penalty attached to rape, and a person committing a theft even of a pin to the penalty attached to larceny.

The cases put of a person suffering from small-pox, diphtheria, or any other infectious disorder thoughtlessly giving a wife or child a mere affectionate kiss or shake of the hand from which serious consequences never contemplated ensue, seem to me cases in which it is impossible to suppose any criminal prosecution would be tolerated, or could, if tolerated, result in a conviction; but I can picture to myself a state of things in which a kiss or shake of the hand given by a diseased person *maliciously with a view to communicate his disorder*, might well form the subject of criminal proceedings. I will not, however, stop to discuss such imaginary cases further.

The case of *Reg.* v. *Bennett* (1), decided in 1866, is an authority directly in support of the view I have taken. The indictment was for an indecent assault on a girl who had consented to sleep with the prisoner, who had connection with her and communicated to her a foul disease. Willes, J., before whom the case was tried, in summing-up told the jury that though it would have been *impossible to have established rape*, yet, if the girl did not consent to the aggravated circumstances, i.e. to connection with a diseased man, his act would be an assault. Willes, J., no doubt, according to the report, based his observations upon the rule that fraud vitiates consent, but it is clear his mind was alive to the point I have been considering, viz. that though there might be such consent to sexual intercourse as to make the connection no rape, nevertheless the infectious contact might amount to an assault: see also *Hegarty* v. *Shine* (2) and *Reg.* v. *Sinclair.* (3)

In dealing with this case my judgment is not based upon the doctrine that fraud vitiates consent, because I do not think that doctrine applies in the case of sexual communion between husband and wife. The sexual communion between them is by virtue of the *irrevocable privilege conferred once for all on the husband* at the time of the marriage, and not at all by virtue of a consent given upon each act of communion, as is the case between unmarried persons. My judgment is based on the fact that the wrongful act charged against the prisoner was not involved in or sanctioned by his marital privilege and for which no consent was ever given at all. For this reason it is unnecessary to discuss or express any opinion upon the various cases cited during the argument relating to connection obtained by fraud, and I accordingly abstain from doing so.

Another argument used for the prisoner was that such cases as the present were not contemplated by the statute under which he was indicted; and it was also said that if it had been intended that the communication of a venereal disease to a woman during an act of sexual intercourse consented to by her should be punishable as a crime, some special enactment to that effect would have been introduced into one or other of the Acts of Parliament

(1) 4 F. & F. 1105. (2) 14 Cox, C. C. 124; C. A. 145.
(3) 13 Cox, C. C. 28.

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relating to women and offences against them. This is an argument to which I attach no weight, assuming the facts bring the case within the fair interpretation of the sections to which I have referred. Moreover, I may point out that *Reg.* v. *Bennett* (1), to which I have referred, was tried in the year 1866, and it is strange, if the law as there laid down was thought to be contrary to the law of the land or to the intention of the legislature, that in no subsequent legislation during the twenty-two years which have since elapsed, has any enactment been introduced in which any expression is to be found indicative of a disapproval of that decision, or that the intention of the statute was at variance with it. I think the legislature contemplated the punishment of *all* grievous bodily harm, however caused, if caused unlawfully and maliciously; and I cannot bring my mind for an instant to believe that, even had the circumstances before us been present to the minds of the framers of the Act, they would have excluded from its operation an offence as cruel and as contrary to the obligation a man owes to his wife to protect her from harm, as can well be conceived.

It has been urged that the case of husband and wife does not differ from that of unmarried persons, and that to affirm this conviction would tend to encourage undesirable prosecutions where disease has been communicated during illicit communion. I do not by any means assent to these propositions. I think the two cases are substantially different. The wife *submits* to her husband's embraces because at the time of marriage she gave him an irrevocable right to her person. The intercourse which takes place between husband and wife after marriage is not by virtue of any special consent on her part, but is mere submission to an obligation imposed upon her by law. Consent is immaterial. In the case of unmarried persons, however, consent is necessary previous to every act of communion, and if a common prostitute were to charge with a criminal offence a man who in having connection with her had infected her with disease, few juries would under ordinary circumstances hesitate to find that each party entered into the immoral communion tacitly consenting to take *all risks*. In the case of women other than prostitutes the

(1) 4 F. & F. 1105.

circumstances of each particular case would have to be considered, and the question how far fraud vitiates consent to such communion would also have to be dealt with. In such cases, too, shame would deter most decent women from appealing to the law, and if a man were the sufferer, seldom would he incur the ridicule and exposure which would be brought upon him. Considering how few prosecutions have been instituted for such causes since the decision in *Reg* v. *Bennett* (1), and entertaining moreover, as I do, a doubt whether any person, man or woman, could as against the public interests consent to the infliction of grievous bodily harm, so as to give a legal defence to a criminal prosecution, although such consent might afford a good defence to a civil action, I do not see any reason for such fears on the subject as have been entertained. Anyhow they cannot affect the law.

Fortified in my opinion, as I believe myself to be, by the plain words of the statute and by the authority of Willes, J., one of the greatest and most accurate lawyers of modern times, I have arrived at the conclusion that this conviction is right and in accordance with the law, and I cannot, therefore, be a party to a judgment which in effect would proclaim to the world that by the law of England in this year 1888 a man may deliberately, knowingly, and maliciously perpetrate upon the body of his wife the abominable outrage charged against the prisoner, and yet not be punishable criminally for such atrocious barbarity.

I may state that this judgment has been read by my brother Day, who requests me to say that he thoroughly concurs in it.

MANISTY, J. I am of opinion that this conviction should be quashed. I need not repeat the observations of those of my learned Brothers who take the same view. The part of this statute with which this Court has to deal purports to consolidate the law with respect to crimes of violence to the person. This case is not, as it appears to me, a case of that description, and was not contemplated by the legislature in framing this part of the statute. Had the legislature intended to make the conduct of the prisoner punishable by statute, I should have expected to find a specific enactment to that effect either in the Acts which

(1) 4 F. & F. 1105.

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have recently been repealed or in the part of this statute which relates to the administration of poison. I speak with the most sincere respect of those members of the Court who have held it to be so, but for my own part I consider it contrary to common sense to describe the act of the prisoner in this case as an assault.

HUDDLESTON, B. I am of opinion that this conviction cannot be supported. I have had the advantage of reading the judgment of my brother Stephen, and I so thoroughly agree with his view that I have not thought it necessary myself to prepare a judgment.

FIELD, J. This indictment contained two counts expressed respectively in the actual words of ss. 20 and 47 of 24 & 25 Vict. c. 100, and charging the prisoner under s. 20 with "unlawfully and maliciously inflicting" upon his wife "grievous bodily harm," under s. 47 with "an assault" upon his wife "occasioning actual bodily harm." The facts proved were that the prisoner had sexual intercourse with his wife at a time when to his knowledge he was suffering from gonorrhœa, his wife being ignorant of this fact, that had she known of it she would not have consented to the intercourse, and that the result of the connection was to communicate to her the disease. The learned Recorder of London directed the jury that if these facts were established they might find the prisoner guilty on both or either of the counts. The jury found the prisoner guilty, and the learned Recorder has stated the case now before us, in which he asks the opinion of this Court whether his direction was right in point of law, and whether upon these facts the prisoner could be properly convicted on both or either of the counts.

The answer to this question depends on the true construction of the Act under which the indictment was preferred, and on a consideration of the authorities, and I have come to the conclusion that the direction of the learned recorder was right, and that the prisoner was properly convicted on both counts.

The questions, then, are, first, Did the prisoner "unlawfully and maliciously inflict grievous bodily harm" on his wife? Secondly, Did the prisoner "occasion bodily harm" to his wife by an "assault"?

Now it has long been established that a man who takes indecent liberties with a woman, or has or attempts to have connection with her, may be properly convicted either of indecent assault or rape, which includes an assault, according to the circumstances of the case, if the acts were done without her consent, express or implied, or against her will. It is, I think, also clear that if the condition of the man is such that it is an ordinary and natural consequence of the contact to communicate an infectious disease to the woman, and he does so, he does in fact inflict upon her both "actual" and "grievous bodily harm." Such an act produces what a great authority, Lord Stowell, describes as "an injury of a most malignant kind:" see the note to *Durant* v. *Durant*. (1) It is also well settled that every sane man must be taken to intend the natural and reasonable consequences of his acts, and the intentional infliction of grievous bodily harm, unless justified or excused by law, is, to my mind, "malicious and unlawful."

Thus far the case rests upon what seem to me to be known and generally adopted principles. But it is argued that here there is no offence, because the wife of the prisoner consented to the act, and I entertain no doubt that, if that was so, there was neither assault nor unlawful infliction of harm. Then, did the wife of the prisoner consent? The ground for holding that she did so, put forward in argument, was the consent to marital intercourse which is imposed upon every wife by the marriage contract, and a passage from Hale's Pleas of the Crown, vol. i. p. 629, was cited, in which it is said that a husband cannot be guilty of rape upon his wife, "for by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract." The authority of Hale, C.J., on such a matter is undoubtedly as high as any can be, but no other authority is cited by him for this proposition, and I should hesitate before I adopted it. There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime. Suppose a wife for reasons of health refused to consent to intercourse, and the husband induced a

(1) 1 Hagg. Eccl. Cases, 768.

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third person to assist him while he forcibly perpetrated the act, would any one say that the matrimonial consent would render this no crime? And there is the great authority of Lord Stowell for saying that the husband has no right to the person of his wife if her health is endangered: *Popkin* v. *Popkin*. (1) It seems to me, however, unnecessary to decide that question in the present case, because the prisoner's wife undoubtedly did consent in fact to the act of intercourse, and therefore consented to all natural and ordinary attendant circumstances or consequences of the act, and also to such as were reasonably within her knowledge and contemplation.

Had, then, the harm inflicted upon or occasioned to the prisoner's wife been one of the consequences of an ordinary natural and healthy connection, or had she known or had reasonable grounds for thinking that her husband was in a diseased condition, her consent to the consequences would, I think, be implied, and so no offence would have been committed. In the same way I think that, if a man knowingly consorts with a prostitute who gains her livelihood by promiscuous intercourse, it may well be implied that he accepts all the consequences. Also, had the prisoner in this case not been aware of his condition, his act would not have been malicious or an assault, for, as he would have had no reason to suppose that his wife would do other than consent, he would have a right to act upon the implication; and I think, therefore, that upon the construction which I am putting upon the Act there will be no danger of bringing within its definitions an injury caused by an innocent or merely thoughtless act of affection between husband and wife. But I have said that here there are undoubtedly was consent on the part of the prisoner's wife to the act of intercourse, and it is now necessary to consider what were the actual circumstances attending this act of intercourse, and what was the nature and condition of the intercourse to which the consent was given.

The actual circumstances were that the prisoner, knowing he had a foul and infectious disease upon him, and that the infection of his wife would be the natural and reasonable consequence of intercourse, solicited intercourse. He also knew that his wife

(1) 1 Hagg., Eccl. Cases, note to *Durant* v. *Durant*, 765.

consented to it in ignorance of his condition. Under these circumtsances I think that her consent to the intercourse in fact was given upon the implied condition that to the knowledge of the prisoner the nature of the intercourse was that to which she had bound herself to consent and had been accustomed to consent, i.e., a natural and healthy connection. But the intercourse which the prisoner imposed upon his wife was of a different nature—one which, in all probability, would communicate to her a foul disease, and to which the jury have found that she would not have consented had she known the state of his health. It seems to me, therefore, to follow that, the mere consent of the prisoner's wife to an act innocent in itself, and in no way injurious to her, was no consent at all to what the prisoner did, and moreover that he obtained such consent as she gave by wilfully suppressing the fact that he was suffering from disease. Such an act between husband and wife is, I cannot doubt, unlawful. In the Divorce Court it has been held that the wilful or reckless communication of disease by the one to the other amounts to legal cruelty, involving the liability to rescission of the marriage contract so far as regards cohabitation and intercourse: *Boardman* v. *Boardman*. (1) There was, I think, a clear duty cast upon the prisoner before he solicited the intercourse to communicate his condition to his wife, and the imposition of intercourse without such communication amounted to a false representation by act and conduct that he was in the same healthy and natural condition as he had been upon previous occasions of lawful intercourse.

The result, therefore, at which I have arrived is that there was no consent in fact by the prisoner's wife to the prisoner's act of intercourse, because although he knew, yet his wife did not know, and he wilfully left her in ignorance as to, the real nature and character of that act. This being so, it follows that there was both an assault and a criminal infliction of harm.

I have arrived at this result by my own unaided construction of the statute and consideration of the law. I now proceed to consider the authorities. They may be divided, according to the facts which they present, into three classes of cases. The first class consists of cases in which a wife's consent has been obtained

(1) Law Rep. 1 P. & D. 233.

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by the fraud of the prisoner inducing her to believe that he was her husband: *Reg.* v. *Saunders* (1); *Reg.* v. *Williams.* (2) The second class consists of cases in which the woman's consent was obtained by fraudulent conduct, inducing her to believe that she was undergoing medical treatment or examination: *Rex* v. *Rosinski* (3); *Reg.* v. *Case* (4); *Reg.* v. *Flattery.* (5) The third class consists of cases in which, as in the present case, the consent of the woman was given in consequence of the wilful and unlawful suppression of an injurious change of natural and previously known conditions: *Reg.* v. *Bennett* (6); *Reg.* v. *Sinclair* (7); *Hegarty* v. *Shine.* (8) Although these cases differ in themselves as to the facts and as to the language used by the Court, all of them, except *Hegarty* v. *Shine* (8), are, as it seems to me, governed by the same principle, which is, that though the woman consented to the act of intercourse she did not consent to it in its actual nature and conditions. In *Reg.* v. *Case* (4) the girl did not resist from a bonâ fide belief, wilfully induced by the prisoner, that she was being treated medically, and the learned Recorder of London, a judge of wide experience in criminal cases, directed the jury that, if they were satisfied that the act was committed under such circumstances, the prisoner's conduct amounted to an assault. This direction was approved by Wilde, C.J., who says in his judgment: "She made no resistance to an act which she supposed to be quite different from what was done, and therefore that which was done was done without her consent." Coleridge, J., whose knowledge and experience in these matters could not be surpassed, said: "She makes no resistance only in consequence of the confidence which she reposed in the defendant as her medical adviser. If there had been no consent, the defendant's act would have been indisputably an assault." Platt, B., said: "The girl consents to one thing, and the defendant does another, that other involving an assault." This was a decision of the Court for the consideration of Crown Cases Reserved. In the case of *Reg.* v. *Flattery* (5), in the same Court, a case of the second

(1) 8 C. & P. 265.
(2) 8 C. & P. 286.
(3) 1 Moody, C. C. 19.
(4) 4 Cox, C. C. 220.
(5) 2 Q. B. D. 410.
(6) 4 F. & F. 1105.
(7) 13 Cox, C. C. 28.
(8) 14 Cox, C. C. 124; C. A. 145.

class, the same doctrine was held, Kelly, C.B., saying: "The girl only submitted to the plaintiff touching her person in consequence of the fraud and false pretences of the prisoner, and the only thing she consented to was the surgical operation."

In these cases the fraud by which the consent was obtained was a fraud as to person and circumstances, and did not as in this case relate to the very act of connection, its physical nature and conditions, and it seems to me to follow that a consent induced by a fraud relating to the physical nature and conditions of the act itself falls still more clearly within this principle. Accordingly so it was held in *Reg.* v. *Bennett.* (1) There that very eminent judge, Willes, J., applied this doctrine, and held that the consent to one act obtained by fraud as to its physical nature was no consent to a different act injurious in its nature, and to which the consent was never intended to be applied. In this respect he was followed by Shee, J., in *Reg.* v. *Sinclair.* (2)

It is true that in *Hegarty* v. *Shine* (3) some of the judges in the Irish Courts expressed disapproval of the ruling of Willes, J., in *Reg.* v. *Bennett* (1), as tending to shew that any fraud is sufficient to convert a civil act of breach of duty into a criminal one, and reliance was placed on this in the argument against the conviction. But I think this disapproval rests upon a misunderstanding of the ruling of Willes, J. As I understand, that very learned judge never meant to say that any fraud must vitiate the consent, but that a consent obtained to one act is not a consent to an act of a different nature, and if obtained by a fraud as to its nature would not render the act lawful. In *Hegarty* v. *Shine* (3), in the Court of Appeal, *Reg.* v. *Bennett* (1) was distinguished, and in no way departed from, and the actual decision in *Hegarty* v. *Shine* (3) does not seem to me in any way to touch the present case.

I think, therefore, that the conviction should be affirmed. I am desired to add that my brother Charles concurs in this judgment.

POLLOCK, B. I agree with the judgment delivered by my learned Brothers who are against the conviction, and had I seen

(1) 4 F. & F. 1105. (2) 13 Cox, C. C. 28.
(3) 14 Cox, C. C. 124; C. A. 145.

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these judgments before I prepared my own, I might have been content to say simply that I assent to them; but as I have set out my own reasons, I think it is only respectful to those from whom I differ that I should read them.

The first count of the indictment is based upon s. 20 of 24 & 25 Vict. c. 100 (1861), which provides that "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person either with or without any weapon or instrument shall be guilty of a misdemeanour." This provision is founded upon and in continuation of the earlier legislation upon the same subject continued in 14 & 15 Vict. c. 19, s. 4 (1851), which is as follows: "And whereas it is expedient to make further provision for the punishment of aggravated assaults: Be it enacted that if any person shall unlawfully and maliciously inflict upon any other person either with or without any weapon or instrument any grievous bodily harm, or unlawfully and maliciously cut, stab, or wound any other person, every such offender shall be guilty of a misdemeanour."

Looking at the language of these two Acts it appears to me that the "grievous bodily harm" which is "unlawfully" inflicted must be the natural consequence of some act in the nature of a blow, wound, or other violence which is in itself illegal, and not merely the result of conduct which is immoral and injurious by reason only of a fraud or breach of good faith; or to put the proposition in another form, "grievous bodily harm" which is the ultimate effect of treachery in the doing of that which is not a "wounding or inflicting, &c., with or without any weapon or instrument," but is the doing of an act of an entirely different character, is not within the terms of the statute. It is also to be observed that although a man is by law held to be responsible for the necessary consequences of his acts, in the case before us it cannot be suggested that the real intent of the prisoner was to inflict grievous bodily harm, or indeed any harm, upon his wife.

The second count charges an assault, and upon this more difficulty arises. Some of the observations which I have already made are equally applicable to this question. Apart from authority, I should be inclined to hold that in this case also an assault must in all cases be an act which in itself is illegal, and

it is not unimportant to notice that the case is one of first impression, as no trace can be found of any previous attempt to bring such conduct, foul and cruel though it be, within the scope of the criminal law. As to this count, however, there is some authority. In *Reg.* v. *Bennett* (1) an uncle was indicted for an indecent assault upon his niece, he being diseased and she ignorant of the fact. It was held by Willes, J., that the prisoner could be properly convicted, and in his summing-up that learned judge said: "An assault is within the rule that fraud vitiates consent, and therefore if the prisoner, knowing that he had a foul disease, induced his niece to sleep with him, intending to possess her, and infected her, she being ignorant of his condition, any consent which she may have given would be vitiated, and the prisoner would be guilty of an indecent assault." This case was followed by *Reg.* v. *Sinclair* (2), in which the prisoner being diseased had connection with a girl who, being ignorant of the fact, consented. As far as I can discover these are the only decisions which have any material bearing upon the case now before us. They are not binding upon this Court, and they have been much questioned in the civil case in Ireland of *Hegarty* v. *Shine.* (3) As at present advised, I see great difficulty in adopting them in their entirety. If the reasoning upon which they are founded be sound, I should have thought that the offence of which the prisoners were guilty was not an assault but rape. Without, however, further argument and consideration, I am not prepared to say that they should be overruled, especially as in cases of a similar kind, which may well arise, they are undoubtedly important and useful in the administration of the criminal law, but I cannot assent to the proposition that there is any true analogy between the case of a man who does an act which in the absence of consent amounts to an indecent assault upon his niece, or any woman other than his wife, and the case of a man having connection with his wife.

In the one case the act is, taken by itself, in its inception an unlawful act, and it would continue to be unlawful but for the consent. The husband's connection with his wife is not only

(1) 4 F. & F. 1105. (2) 13 Cox, C. C. 28.
(3) 14 Cox, C. C. 124, C. A. 148.

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lawful, but it is in accordance with the ordinary condition of married life. It is done in pursuance of the marital contract and of the status which was created by marriage, and the wife as to the connection itself is in a different position from any other woman, for she has no right or power to refuse her consent. As is said by Lord Hale in his Pleas of the Crown, vol. i. p. 629: "By their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." Such a connection may be accompanied with conduct which amounts to cruelty, as where the condition of the wife is such that she will or may suffer from such connection, or, as here, when the condition of the husband is such that the wife will suffer.

To hold that an act in itself innocent becomes a criminal assault by reason of the concealment of a material fact, which, if communicated, might give rise to an objection by the person affected by the act, would, where there is disease, include a variety of cases beyond that which is now under discussion; such as a kiss given by a parent suffering from small-pox or scarlet fever to his child, or even the shaking of a friend's hand by one who is suffering from a contagious disease. On the other hand, to say that the prisoner has been properly convicted would not under all circumstances cope with the evil and moral wrong which it is desired to punish, for I suppose no one would contend that, if a wife being diseased encouraged her husband to have connection with her, she was guilty of an assault. All this goes to shew that the real offence is not an assault but the suppression or concealment of that which ought to have been communicated; and that if it be desirable to bring it within the criminal law it should be done by legislation.

As to the decision of *Reg.* v. *Case* (1), and *Reg.* v. *Flattery* (2), cited by counsel for the prosecution, in which medical men, who under the pretence of affording medical or surgical assistance to women, had connection with them, were held guilty of rape, they afford no assistance. In these cases the intent of the prisoners to commit a rape was clear, though the means by which they accomplished their purpose was fraud, the fraud being of such a

(1) 19 L. J. (Mag. C.) 174. (2) 2 Q. B. D. 410.

nature that under the pretence of performing an act in itself lawful and beneficial to their patient they committed an act of a totally different character which was in itself illegal and criminal.

These considerations have led me to the conclusion that this conviction cannot be supported.

LORD COLERIDGE, C.J. I was for some time of opinion that this conviction could be sustained. Every one would, I suppose, desire to sustain the conviction in this particular case if it could be done without violating the sound principles of legal construction. I confess that the logical deduction from the words of the statute which has been drawn by my learned brothers, Field and Hawkins, is one which I find it difficult logically to controvert. But although it may perhaps not be a good answer in reasoning, yet in such a matter as the construction of a statute, if the apparent logical construction of its language leads to results which it is impossible to believe that those who framed or those who passed the statute contemplated, and from which one's own judgment recoils, there is in my opinion good reason for believing that the construction which leads to such results cannot be the true construction of the statute. Two cases have been put in a sentence by my learned brother Pollock in the judgment which he has just read, which had occurred to me early in the argument, which were then difficulties in my mind, and which have at last proved too much for me, and I cannot answer them. If this conviction can be sustained it seems to me impossible to deny that in logic a conviction could be sustained against a father or relative for infecting a child with the small-pox or with any other contagious disease if the father or relative was aware that he had the disease upon him, but the child was not aware of his condition. Now I give that simply as an example, but examples of the results into which this construction would lead us might be given in great numbers. I am unable to believe that the statute could have contemplated results which nevertheless seem to follow logically from the construction which has been put upon it by my learned Brothers who are in favour of sustaining this conviction, and I am therefore reluctantly unable to agree with

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them. I am consequently of opinion that this conviction should be quashed, and I assent to the reasoning of my brothers Stephen and Wills in their judgments, which I have had the satisfaction of reading, and with all or almost all of which I agree.

Conviction quashed.

Solicitor: *Solicitor to the Treasury.*

H. D. W.

Nov. 24.

[CROWN CASE RESERVED.]

THE QUEEN *v.* ADAMS.

Criminal Law—Libel—Letter written to Woman proposing Immoral Intercourse —Defamatory Libel tending to provoke Breach of the Peace.

The defendant was tried and convicted on an indictment charging him with having unlawfully and maliciously written and published to a young woman of virtuous and modest character a defamatory letter of and concerning her, and of and concerning her character for virtue and modesty. The defendant having seen an advertisement for a situation inserted by the young woman in a newspaper, wrote, and sent to her at the address given, the letter in question, which contained a proposal in plain terms that she should surrender her chastity to him for a sum of money:—

Held, that the conviction could be sustained, because, under all the circumstances, the defamatory letter might reasonably tend to provoke a breach of the peace.

CASE stated by the Recorder of London for the opinion of the Court for the Consideration of Crown Cases Reserved.

At the sessions of the Central Criminal Court, held on September 17, 1888, J. C. Adams was tried on an indictment which charged him, in the third count, with having, on June 19, 1888, unlawfully, wickedly, and maliciously written and published to E. S. Y., the younger, who was a good, peaceable, virtuous, and worthy subject of our Lady the Queen, in the form of a letter directed to her, the said E. S. Y., the said letter containing divers false, scandalous, malicious, and defamatory matters and things of and concerning the said E. S. Y., and of and concerning the character for virtue, modesty, and morality then borne by the said E. S. Y. [the letter was set out], to the great damage, scandal, infamy, and disgrace of the said E. S. Y., to the evil example, &c., and against the peace, &c.

The letter (which it is thought unnecessary to print in full) began:—"I have seen your advertisement in the *Daily Telegraph*. I have no situation to offer you, but I should like to ask you a thing or two. I am a young man, twenty-five .... I should like to make certain proposals to you. Of course this is strictly private between you and I." The letter then proceeded to state, in very plain language, that if E. S. Y. was a virgin the writer would offer her anything up to 10*l.* to allow him to have immoral intercourse with her. He also said that perhaps one day she would lose her virginity for nothing; that he would treat her well; that he was a highly respectable young man, and gave his word that, if she was willing to consent to his proposals, she should have whatever she asked in money. He asked her to reply in an evening paper stating the number of pounds she wanted; and he concluded, "Think over it, dearest; and if you are willing and answer as above, I will write to the same address as this letter."

Evidence was given that E. S. Y., the younger, inserted an advertisement in the *Daily Telegraph*, and that it was stated in it that replies were to be addressed to K. S., 21, Radnor Street, Old Street, E.C.; that the prisoner wrote the letter set out in the third count of the indictment, and inclosed it in a sealed envelope addressed as required by the advertisement, and that he posted it; that the letter was received by E. S. Y., the elder, who opened and read it, and then handed it to a sergeant of police, and that it was never seen by E. S. Y., the younger.

At the close of the case for the prosecution counsel for the prisoner submitted that there was no case to go to the jury, on the grounds (inter alia) that to write and send to a person letters in the form of those set out in the indictment was not an indictable offence; that the letter set out in the third count was neither a defamatory libel nor an obscene libel; and that there had been no publication of it.

The recorder declined to stop the case upon the objections taken, but left it to the jury, who convicted the prisoner on all the counts of the indictment.

The recorder thereupon respited judgment and admitted the prisoner to bail.

The question for the opinion of the Court was whether, upon

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the facts stated the prisoner could properly be convicted on all or any of the counts of the indictment.

P. T. Blackwell, (*G. A. Blackwell*, with him), for the defendant. The conviction was wrong. The letter is not a defamatory libel. It is a mere incitement to commit private immorality, which has never been held a criminal offence. Even if it be a defamatory libel there was no publication to other persons, and it is not of a nature to provoke a breach of the peace, so as to bring the case within the rule that a defamatory libel written to the person defamed, and not published to others, is punishable criminally if it tends to provoke a breach of the peace: *Hick's Case* (1); *Rex* v. *Wegener* (2); and cases collected in Starkie on Libel, 4th ed. p. 416. If the young woman to whom the letter was sent had consented to the defendant's proposals no criminal offence would have been committed. It is a strange result of the law if the mere making of the proposals constitutes a criminal offence. There is no precedent of authority for saying that it is any offence at common law to write or send such a letter as this, and it is dangerous to create such a precedent, because it opens the door to the making of a new set of charges against men in order to extort money. If any change in the law is required in this respect, it should be left to the legislature to make it.

Poland, for the Crown. The defendant was properly convicted on the third count of having committed the common law offence of writing and publishing a defamatory libel tending to provoke a breach of the peace. It is the offence described in 1 Hawk. P. C., c. 73, s. 11; *Reg.* v. *Holbrook* (3), judgment of Lush, J., at p. 46 of the report; Starkie on Libel, 4th ed. p. 416; Bac. Abridg. tit. Libel, B. The sending of such a letter to a modest young woman is a gross insult, and nothing would be more likely to provoke a breach of the peace.

P. T. Blackwell, replied.

[As no judgment was given upon the points raised on the other counts of the indictment, it is unnecessary to state the arguments, and the numerous authorities cited, with respect to those points.]

(1) Hob. 215; Popham, 139. (2) 2 Stark. 245.
(3) 4 Q. B. D. 42.

LORD COLERIDGE, C.J. It is unnecessary to discuss some of the important questions which have been raised in this case. Upon those questions, therefore, I, and I believe the other members of the Court, desire to give no opinion. It appears to me that there is a very short and plain ground upon which this conviction can be sustained. It is a conviction upon an indictment the third count of which charges that the letter there set out is a defamatory libel tending to defame and bring into contempt the character of the person to whom it was sent. I am of opinion that the letter is of such a character as that it tended to provoke a breach of the peace. At all events, the sending of such a letter to the person to whom it was sent might, under the circumstances of her position and character, reasonably or probably tend to provoke a breach of the peace on her part, or on the part of those connected with her. The jury must be taken to have found that it was a defamatory libel which was calculated to provoke a breach of the peace; and on that short ground I am of opinion that the conviction must be affirmed on the third count of the indictment.

MANISTY, HAWKINS, DAY, and A. L. SMITH, J.J., concurred.

Conviction affirmed.

Solicitor for the Crown: *Solicitor to the Treasury.*
Solicitor for defendant: *John Hayward.*

W. A.

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Oct. 30.

[IN THE COURT OF APPEAL.]

THE MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY *v.* SMITH.

Landlord and Tenant—Lease by Mortgagor in Possession—Rights of Mortgagee under Lease—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 10, 18.

Where a lease is made by a mortgagor in possession under the powers given by the Conveyancing and Law of Property Act, 1881, the mortgagee, on giving notice to the tenant and going into possession, is entitled by virtue of the Act to enforce the covenants and conditions in the lease in the same manner as if he had been a party to it, and such right cannot be affected by any collateral agreement between the lessor and the lessee.

THIS was an action of ejectment tried before Hawkins, J., without a jury.

In May, 1882, land was mortgaged to the plaintiffs by one Davis, who, in 1885, being in possession, granted a building lease of the mortgaged land to the defendant under the powers given by and in accordance with s. 18 of the Conveyancing Act, 1881. The plaintiffs were not parties to the lease, which contained a power of re-entry for non-payment of rent. Concurrently with the lease an agreement was made between Davis and the defendant that the latter should retain the rent payable under the lease as it fell due towards repayment of a sum of money advanced by him to Davis. The plaintiffs subsequently gave to the defendant notice of the mortgage, and that the rent should be paid to them. As this was not done, they brought this action, which resulted in a judgment for the plaintiffs.

The defendant appealed.

T. Terrell, for the defendant, contended that although the lease was valid as against the plaintiffs, there was nothing in the Conveyancing Act, 1881, to shew that they could enforce its provisions on their own behalf against the tenant, and that, at all events, they could not be in a better position than Davis, and if they took the benefit of the lease they did so subject to the collateral contract.

T. Willes Chitty, for the plaintiffs. Whereas before the statute a mortgagor, whether in possession or not, could not grant a

lease valid as against the mortgagee, who might treat the tenant under any such lease as a trespasser, the Conveyancing Act, 1881, now provides that a lease in conformity with s. 18 is valid against the incumbrancer, and the combined effect of ss. 10 and 18 (1) is that the mortgagee may intervene at any time, and if he does so has all the rights of a lessor under the lease. [He was stopped.]

LORD ESHER, M.R. In this case an action of ejectment has been brought by the mortgagees against the tenant in occupation of the mortgaged property to recover it under a power of re-entry for a breach of covenant to pay the rent. The lease was granted by a mortgagor in possession, and contains such provisions as are described in s. 18 of the Conveyancing Act, 1881, and is consequently within that section. The effect of s. 18 is that the mortgagor if he makes a lease which complies with its terms, makes a lease which is good against the mortgagee, and the result is the same as if the lease had been made with the authority and concurrence of the mortgagee. Now such a lease may be made either with or without notice to the tenant of the existence of the mortgage. In either case he is safe in dealing with the mortgagor, because the mortgagee cannot treat him as a trespasser as he could before the passing of the Act. The lease being valid under s. 18 against the mortgagee established a relationship between him and the tenant, but until something more is done the tenant may safely deal with the mortgagor. But s. 10 says in effect

(1) 44 & 45 Vict. c. 41, sect. 10: "Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased."

Sect. 18: "A mortgagor of land while in possession, shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized . . ."

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that the rent and the benefit of covenants in a lease are to go with the reversionary estate expectant on the terms granted by the lease, and inasmuch as this lease is binding on the mortgagee as if made with his authority, he is in the position of having a reversionary estate in the land expectant on the term granted by the lease. If he desires to avail himself of his rights under these circumstances, he must give notice, not merely that he is mortgagee, but that he intends to exercise those rights. When that is done the tenant can no longer deal with the mortgagor, but must treat the mortgagee as if he were the person with whom the contract had been made, and if after that there is a breach of covenant, the mortgagee can take advantage of it. That has been the case here, and as rent was in arrear the plaintiffs had a right to re-enter under the condition contained in the lease. There was, however, an agreement between the mortgagor and the tenant, that instead of paying the rent he should keep it as against an advance made by him to the mortgagor. This, however, was an independent agreement, and does not affect the mortgagee, who was entitled to enter for breach of covenant independently of any collateral agreement. I think the judgment was right, and the appeal must be dismissed.

FRY, L.J. As the case is of some importance, I will add a judgment in my own words. The sequence of events was this: there was a mortgage of the land, then a lease by the mortgagor, coming within the requirements of the Conveyancing Act, 1881, and an advance by the defendant to him with an agreement that the rent might be retained as it became due to meet this advance, then notice by the mortgagee to pay the rent to him, and default. The question turns on the Conveyancing Act, 1881, and the effect of s. 18 is that Davis, while in possession as mortgagor, had power to make this lease, and to bind the plaintiffs. The statute in fact gives the mortgagor power to create a term out of the estate of the mortgagee, and so to convert that estate into one expectant on the term granted by the lease. That would seem to shew that it was intended that the mortgagee should have the rights of a lessor under the lease. If this were not so it would follow that the mortgagee's estate would be diminished, and he

be turned into a reversioner, but without any compensating rights. I find, however, in the same section evidence confirmatory of the conclusion I have arrived at, for by sub-s. 11 it appears that the mortgagor is to deliver to the mortgagee a counterpart of the lease, which would be useless unless the latter has some rights under it.

Again, under sub-s. 12 a contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding. It is highly improbable that it would be enacted that the mortgagee might enforce an agreement for a lease of which when made he could not take advantage. But if there were any obscurity under s. 18 taken alone as to the rights of a mortgagee, it would be entirely removed by s. 10, which declares that covenants by a lessee are to go with the reversion, and that notwithstanding the severance of the reversionary estate. I know no better instance of severance of a reversionary estate than the case of mortgagor and mortgagee, and I expect that the words were introduced to meet the very case of severance by creation of a mortgage.

In the present case there was a collateral agreement, and it is said the mortgagees are in the same position as the mortgagor, and are bound by that agreement. The lease, however, is made binding on the mortgagees by statute, while the collateral agreement does not bind them in any way. They can consequently take the benefit of one contract independently of the burthen of the other. With regard to what would have been the rights of the parties if the defendant had assumed the position of the mortgagor and offered to pay what was found due to the mortgagee on taking an account, I say nothing. Not having made the tender he is not now in a position to do so. Notice was given in this case, and so no question arises as to the relative rights of the parties before notice to the tenant to pay rent to the mortgagee.

I agree that the appeal must be dismissed.

LOPES, L.J. Sect. 18 of the Act empowers a mortgagor in possession to make a lease which shall be binding on the mortgagee, and in my opinion it is so in the same way as if he had joined in granting it. The mortgagee cannot now treat such a

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tenant as a trespasser. The effect of ss. 10 and 18 is that the relation of landlord and tenant is created so soon as the mortgagee gives notice that he intends to place himself in possession of the property, and when that is done he can eject the tenant for breach of covenant. I agree that the mortgagees are not bound by the collateral agreement. The judgment therefore of Hawkins, J., was right and the appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiffs: *C. A. Russ.*

Solicitors for defendants: *Arnold Williams & Bunn.*

A. M.

Nov. 29.

[IN THE COURT OF APPEAL.]

BAYNTON *v.* MORGAN.

Landlord and Tenant—Lease—Covenant by Lessee to pay Rent reserved—Assignment—Surrender of Part of Premises by Assignee—Effect of—Apportionment.

The plaintiff demised premises to the defendant for a term of years by deed containing a covenant by the defendant for the payment of the rent reserved. The defendant assigned the term, and his assignee surrendered a portion of the premises to the plaintiff. In an action on the covenant the plaintiff claimed to recover the amount of the apportioned rent for the part of the premises not surrendered:—

Held, that the liability of the defendant on the covenant was not extinguished by the surrender of part of the demised premises, but he still remained liable thereon, at any rate to the amount claimed.

Quære, whether he remained liable to the extent of the whole of the rent originally reserved.

APPEAL from the judgment of the Queen's Bench Division upon appeal from the County Court of Southwark.

The facts appear fully from the report of the case in the court below (21 Q. B. D. 101), but, so far as it is necessary to state them for the purposes of this report, they were briefly as follows:—The action was by lessor against lessee upon a covenant in a lease for payment of rent. The plaintiff had demised to the defendant, by a deed under seal, a house and premises for the term of twenty-one years at the yearly rent of 50*l.*, payable quarterly, and in the lease the defendant, for himself, his heirs,

executors, administrators and assigns, covenanted with the plaintiff that he, his executors, administrators, or assigns, would at all times during the said term well and truly pay, or cause to be paid, the said yearly rent of 50*l.* upon the respective days thereinbefore appointed for payment thereof. The defendant assigned all his interest in the term to one Evans, who entered on the premises and paid the rent. Evans surrendered to the plaintiff a small portion of the premises, and subsequently assigned his interest in the term to one Morgan (not the defendant), who became bankrupt. The quarter's rent due in September, 1887, not being paid, the plaintiff brought his action against the defendant on the covenant to recover the same. It was arranged that it should be referred to a referee to ascertain what, assuming that there could be an apportionment of the rent for the purposes of the covenant, the fair rent apportionable for the part of the premises surrendered was, and he had found that it was 4*l.* per annum. The plaintiff ultimately limited his claim to the amount of 11*l.* 10*s.*, being the quarter's rent of 12*l.* 10*s.*, less 1*l.*, the apportioned rent of the piece surrendered.

The county court judge gave judgment for the plaintiff for that amount, and the Queen's Bench Division on appeal affirmed his judgment.

Jelf, Q.C., and *H. Terrell*, for the defendant. The contention for the defendant is that the covenant to pay the rent, being a purely personal covenant not arising out of privity of estate, is not apportionable. It is impossible to contend that the whole of the rent reserved by the lease remains payable under the covenant after the surrender of a part of the demised premises: therefore it follows that the obligation under the covenant is altogether gone. It would be a strange thing if the landlord could buy back from an assignee all the demised premises with some insignificant exception and still claim the whole amount of the rent from the lessee. What has taken place here is analogous in principle to an eviction by the landlord from part of the demised premises, which suspends the rent as long as the tenant remains evicted: *Neale* v. *McKenzie* (1); Platt on Covenants, 197.

(1) 1 M. & W. 747.

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Further, it is contended that the covenant by the lessee for the payment of rent by his assignee is in substance a contract of suretyship, and, therefore, on the general principles of the law of suretyship, any alteration of the terms of the lease as between the landlord and the assignee behind the back of the lessee extinguishes his liability. The object of the insertion of the personal covenant to pay rent is merely to secure the payment of the rent after an assignment, the lessee's liability on the reddendum, or what has been called the real contract, being gone with the privity of estate.

[FRY, L.J. The lessee covenants that his assigns will pay, not that he will pay if they do not. The words of the covenant appear to import a primary liability.]

If the lessee is not in the position of a surety, the lessor could give time to the assignee and so preclude himself from suing the assignee for the rent, and yet might immediately sue the lessee, which would be a great hardship and anomaly.

[FRY, L.J. The lessee by assigning all his interest to Evans, his executors, administrators and assigns, himself gave power to Evans to surrender part of the premises. How, then, can such a surrender operate as suggested?]

It is submitted that an assignment does not amount to an authority to surrender in the sense required as against the surety.

[They cited on this point *Upton* v. *Townend* (1), and *Moule* v. *Garrett*. (2)]

The covenant is to pay the "said rent," that is the rent originally reserved by the lease. It is not a covenant to pay whatever amount of rent may remain payable in respect of the demised premises. The rent is incident to the reversion, and the reversion being severed the reserved rent in its entirety is no longer payable, and the rent, though apportionable for the purposes of the real contract contained in the reddendum, is not apportionable for the purposes of the personal covenant. In *Stevenson* v. *Lambard* (3) Lord Ellenborough so held.

[LORD ESHER, M.R. He cannot be said to have so held, for

(1) 17 C. B. 30. (2) Law Rep. 5 Ex. 132.
(3) 2 East, 575.

the action there was, not against the lessee, but against the assignee, and there was privity of estate. All that was held there was that in that case there could be an apportionment.]

To whatever amount the lessor is entitled to recover from the lessee, the latter ought on principle to have a right of indemnity against his assignee, but the assignee is no longer liable for the whole rent. Leonard, 3rd part, p. 1; Moor. 115, pl. 260; and Brooke's Abridgment tit. Contract, pl. 16, are authorities that the personal covenant is not apportionable.

[They also cited *Thursby* v. *Plant* (1), and *Holme* v. *Brunskill.* (2)]

Channell, Q.C. (*Jason Smith*, with him), for the plaintiff, cited *Walker's Case.* (3) They were not called on to argue.

LORD ESHER, M.R. In this case an action has been brought by the plaintiff upon a personal covenant by the defendant for the payment of rent reserved in a lease. The plaintiff agreed at the trial to take judgment for part only of the quarter's rent for which the action was brought. It is contended for the defendant, however, that the plaintiff is not entitled to recover from him either the whole or any part of such rent. We have now to decide whether that contention is well founded. One of the grounds relied on by the defendant is that this covenant, after an assignment, is merely one of suretyship, by which the lessee guarantees the payment of the rent by his assignee of the lease; and, that being so, that, the assignee and the lessor having altered the original contract without the consent or knowledge of the guarantor, he is released from further liability on the covenant. The true answer to this contention seems to me to be that this is not a contract of guarantee. We must construe this contract, which is in writing, in accordance with its terms. There is not a word in it about a guarantee. It is a direct promise that certain sums of money shall be paid as rent on certain days during a certain period. Such being its express terms, it could only be contended to be a contract of suretyship by virtue of some implication. I see nothing that authorizes us to make any such

(1) 1 Wms. Saund. 5th ed. 237, 240. (2) 3 Q. B. D. 495.
(3) 2 Rep. part iii., 22 b.

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implication. It was suggested that, unless the contract were treated as one of suretyship, some hardship might arise. I do not think that such considerations afford any ground for altering the effect of the plain words of the covenant. If there were any hardship, it would be one arising out of the terms of the contract which the parties have chosen to make. Even if this were a contract of guarantee, I do not think the defendant could establish a defence on that ground. It is one of the conditions to which such a contract is by law subject that, if the terms of the contract as between the principal debtor and the creditor are altered without the knowledge or authority of the surety, the latter is released from liability on the guarantee. In this case I think that the terms of the lease, though altered without the knowledge of the lessee, were not altered without his authority, for I agree with the opinion expressed by A. L. Smith, J., in the court below, viz., that a lessee by assigning all his interest in the term to an assignee empowers the assignee, if he so desires, to surrender to the lessor all or any part of the demised premises. He gives to his assignee the powers which he might himself have exercised, and, as he himself might have surrendered part of the premises, he authorizes his assignee to do so. The true answer, however, to the argument appears to me to be that the contract is not one of suretyship, but one creating a primary liability. The covenant for payment of the rent is a covenant which has been usually inserted in leases for a very long time, I think I may safely say for at least a hundred years, and it has never been suggested before that it is a contract of guarantee.

The contract therefore not being one of guarantee, but importing a primary liability, it is material to remember that it is a contract under seal, and therefore would be binding without any consideration. It follows, as it seems to me, that an alteration of the actual consideration would be immaterial, for a partial failure of consideration cannot, one would think, have a greater effect than a total absence of consideration. What, then, is the nature of the promise? It is a covenant for the payment of what was the agreed rent at the time of the lease on the specified quarter days during the term. If it could be shewn that the term had come to an end, no doubt the period to which the contract

applied would be gone. The term may, of course, come to an end by expiration of the period for which the lease was granted. It may come to an end in other ways, for example by a surrender of the whole of the demised property to the landlord accepted by him: but it has been held that a surrender by the lessee himself of part of the demised property does not have the effect of putting an end to the term. That being so, it seems to me clearly to follow that a surrender of part by an assignee to whom the lessee has given authority to do that which he himself could have done cannot have that effect. Therefore it cannot be said that the term has been put an end to by the assignee surrendering part of the premises. Then it is said that there has been what is equivalent to an eviction from part of the premises. What has really happened is that, the lessee having assigned his lease to an assignee, to whom by so doing he has given authority to surrender in the sense that he cannot object to his so doing, such assignee has surrendered part of the premises to the landlord. How in any sense can that be said to amount to an eviction by the lessor, a term which implies for this purpose something wrongfully done by the lessor against the will of the lessee? There can be no suggestion of anything wrongfully done by the lessor. It seems to me quite impossible to say that there has been anything in the nature of an eviction in this case. Therefore the term still continues to subsist.

It is no doubt true that the original consideration, which in fact existed, though no consideration was necessary to support the covenant, has been altered; for, such consideration being the enjoyment of the premises for a certain term, a part of the premises is no longer enjoyed; and, that being so, it is suggested that the whole of the rent can no longer be payable, and that the covenant cannot be apportioned, and therefore is gone altogether. It is not necessary under the circumstances to decide whether there can be an apportionment for the purposes of the covenant or not. If there cannot be an apportionment, I think the result is that the defendant must pay the whole. I am not prepared to say that, because there cannot be an apportionment, therefore the covenant is wholly gone. There does not appear to me to be any authority for that proposition, and in fact, so far as they

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go, the authorities to which our attention has been called seem to tend the other way. If the sum can be apportioned, then by the consent of the plaintiff it has been, and he therefore has got judgment for what he is entitled to; if it cannot be apportioned, then I think the plaintiff would be entitled to the whole but for his having given up part of his claim. It is only necessary for the purposes of this case to decide that the surrender of part of the premises by the assignee did not destroy the covenant altogether. For these reasons I think that the judgment of the Court below should be affirmed, and this appeal must be dismissed.

FRY, L.J. In this case there was a demise of certain premises and a surrender of a portion of the premises by an assign of the lessee; and, an action having been brought by the lessor against the lessee on the covenant for payment of the rent contained in the lease, the question arises whether that covenant has been extinguished by the surrender of a part of the premises. There are three possible cases. It may be that the covenant remains unaffected: or it may be that there should be an apportionment of the rent covenanted to be paid: or it may be that the covenant is altogether destroyed. It is only in this latter case that the defendant can succeed. I do not think that the covenant is extinguished. It was argued that it was extinguished by what amounted to an eviction. I do not think that contention can be sustained. An eviction must be by the landlord's action contrary to the will of the lessee. The assignment of the lease by the lessee gave power to the assign to assign again, and he therefore surrendered to the landlord by virtue of the terms of an instrument to which the lessee himself was a party. Any idea of an eviction is quite out of the question.

Then it was contended that the covenant was a contract of suretyship. There may be expressions in one or two cases in which the obligation of the lessee on such a covenant, after he has parted with his whole interest by assignment, is spoken of as being in the nature of a contract of suretyship. But that which is said to be in the nature of a thing is not the thing itself, and there is no case which says that the contract is one of suretyship.

If it were, then the landlord, by giving time to the assign to pay the rent, would extinguish the liability of the lessee on the covenant. Such a giving of time must often have happened, and yet there is no case in which it has been suggested that it extinguished the lessee's liability. It seems incredible, if the doctrines relating to suretyship are applicable to such a covenant, that there should have occurred no case in which those doctrines have furnished a defence to an action on the covenant. Yet there is no instance of the kind in the books. I think that this circumstance alone gives rise to a strong presumption against the argument. And, when I turn to the covenant itself, I come without hesitation to the conclusion that its terms import a direct contract for payment of the rent by the assign, not a contract to be surety for payment by him.

The contract is that the lessee, his executors, administrators, or assigns, will at all times during the term well and truly pay the said rent of 50*l.* a year on the specified quarter-days. It has been suggested that that word "said" carries us back to the reddendum, and renders applicable the doctrine of apportionment, which would be applicable to the rent as reserved by the reddendum. If so, then the covenant is apportionable, and the defendant is out of court. If that is not so, then we have an absolute covenant to pay the rent of 50*l.* on certain quarter-days at all times during the term. When the term ends, either by expiration of time or by surrender of the term, the covenant comes to an end. Till that happens, I think that it subsists, and the result must be either that the covenant is apportionable, or that it remains unaffected. We were pressed with the following argument. It was said that rent payable under the reddendum was apportionable, but the rent payable under the covenant was not apportionable; therefore it was argued that the covenant was entirely gone. I fail to see the sequence of that argument. If the covenant be not apportionable, one of two conclusions follows—viz., either that the covenant is altogether gone, or that it subsists in its entirety. Either of those conclusions is as much open to the objection on the score of hardship, which has been suggested, as the other. If ninety-nine hundredths of the property demised were surrendered, it

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might be said that it would be a hardship that the whole rent should still be payable under the covenant. On the other hand if one hundredth only were surrendered, it might be said that it would be hard that the covenant should be entirely extinguished. The objection of possible hardship being equally applicable to either view, it is impossible to decide the case on any ground of hardship. If it be true that the covenant is not apportionable, then I think that according to the authorities it must subsist in its entirety for the plain reason that the lessee has covenanted that he will pay this rent; and why should he be entirely released, because there has been a surrender of part of the premises which he must be taken to have contemplated by the terms of his own assignment? For these reasons I think that the defendant's case fails.

LOPES, L.J. The action is brought upon an express covenant by the lessee, couched in clear and unambiguous terms, for the payment of the rent reserved by the lease on the proper quarter days at all times during the term. The rule of law is that a lessee remains liable upon his express covenants, notwithstanding an assignment and acceptance by the landlord of rent from the assignee, and there is an implied promise on the part of each successive assignee to indemnify the lessee against breaches of the covenants of the lease in his own time. Then how can the liability under the express covenants be got rid of? It may cease by reason of a surrender of the term, a surrender of all the premises demised by the lease, an eviction, or a release. There can be no suggestion here that there has been a surrender of the term or of all the premises comprised in the lease. It is said that there has been something analogous to an eviction by the landlord. The facts here do not, in my opinion, shew an eviction or anything analogous thereto. Such an eviction imports a wrongful entry by the landlord and dispossession of a tenant in possession. The defendant here was not in possession, and the effect of the assignment which he himself made was to authorize a surrender by the assignee to the landlord. He could himself have surrendered, and by putting his assignee in his shoes he authorized him to do what he himself might have done. Then

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of course there can be no suggestion of a release here. It was argued that the covenant is one of suretyship. I agree with what has been said by the Master of the Rolls and my brother Fry as to that argument. Reading the covenant as it stands, it contains nothing about suretyship, and the terms of it clearly import a primary and not a collateral liability. Whether the covenant is apportionable or not, it is not necessary to decide, for the plaintiff has submitted to an apportionment. I am of opinion that the surrender of part of the premises by the assignee did not extinguish the covenant. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Wolferstan & Avery.*
Solicitors for defendant: *Daniel Jones & Linnett.*

E. L.

[IN THE COURT OF APPEAL.]

Oct. 26.

IN RE FLATAU; EX PARTE SCOTCH WHISKY DISTILLERS, LIMITED.

Bankruptcy—Petitioning Creditor's Debt—Judgment—Appeal pending from Judgment—Staying Proceedings on Bankruptcy Petition—Power of Court of Bankruptcy to inquire into Validity of Judgment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-ss.* 3, 4.

When in a bankruptcy petition the act of bankruptcy relied on is the failure to comply with a bankruptcy notice to pay a judgment debt, the mere fact that an appeal is pending from the judgment is not a sufficient ground for staying the proceedings upon the petition.

The Court of Bankruptcy will not, as a matter of course, inquire into the validity of a judgment debt, but only when there is evidence that the judgment has been obtained by fraud or collusion, or that there has been some miscarriage of justice.

Ex parte Lennox (16 Q. B. D. 315) explained.

In re Saville (4 Morrell, Bky. Cas. 277) approved and followed.

APPEAL against a receiving order.

The bankruptcy petition on which the order was made was presented by the Scotch Whisky Distillers, Limited, in respect of a debt of £9230, for which they had on July 3, 1888, recovered judgment against a partnership firm of Elborough & Co., Flatau being adjudged to have been a partner in that firm. The judg-

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ment was obtained after a trial of the action before Mathew, J., with a jury. The act of bankruptcy alleged was non-compliance with a bankruptcy notice in respect of the judgment debt. On August 28, Flatau gave notice of appeal against the judgment, and the appeal was set down. The registrar was asked to adjourn the hearing of the petition pending the appeal against the judgment, but he refused to do so, and made a receiving order. The debtor appealed.

Cooper Willis, Q.C., and *Gwynne James*, for the appellant. The registrar ought, in accordance with the power conferred by (1) sub-s. 4 of s. 7 of the Bankruptcy Act, 1883, to have adjourned the petition pending the appeal from the judgment. "Sufficient cause" within the meaning of sub-s. 3 was shewn for not making a receiving order.

The Court of Bankruptcy has power to go behind a judgment, and to inquire into the validity of the debt, and the registrar would have been justified in exercising this power and in dismissing the petition, on the ground that there was no valid debt: *Ex parte Lennox.* (2)

Herbert Reed, for the petitioning creditors, referred to *In re Saville* (3); *In re Lipscombe.* (4)

LORD ESHER, M.R. The first point taken is, that the mere fact that an appeal against the judgment had been lodged made it the duty of the registrar to postpone the bankruptcy petition until after the appeal had been determined. If this be so, it will be in the power of every judgment debtor, if he sees that the Court of Appeal is full of business, to postpone the hearing of a bankruptcy petition founded on the judgment debt for months

(1) Sect. 7, sub-s. 3: "If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition."

Sub-s. 4: "When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure, or compound for a judgment debt, the Court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment."

(2) 16 Q. B. D. 315.

(3) 4 Morrell, Bky. Cas. 277.

(4) 4 Morrell, Bky. Cas. 43.

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—it may be for years—by merely entering an appeal against the judgment. But sub-s. 4 of s. 7 really enacts the very contrary of that which is contended for. It provides in effect that, when an appeal against a judgment has been lodged, the registrar must take into consideration the circumstances of the case and say whether in the particular case the lodging of the appeal calls upon him either to postpone the hearing of the petition, or to dismiss it, for he has power to do that. In other words, sub-s. 4 gives the registrar a discretion, which, of course he must exercise judicially. If the Court of Appeal were clearly of opinion that the registrar had exercised his discretion wrongly, it would have authority to overrule his decision. But, unless the Court of Appeal should be clearly of opinion that the registrar had exercised his discretion wrongly, it ought not to interfere, and this applies whether the registrar has postponed the petition or has declined to do so. I do not think that this Court laid down any different rule in *Ex parte Lennox*. (1)

Another point was taken—viz., that although an action has been tried by the proper tribunal, a judge alone or a judge with a jury, and definite issues have been thoroughly tried out, and decided against the debtor, and judgment has been given against him accordingly, he against whom judgment has thus been given, without his being able to suggest that there was any miscarriage of justice at the trial, is entitled to go into the Court of Bankruptcy, and, even though he has appealed against the judgment, assert that the action was not properly tried, and say to the registrar, you must try every one of the issues over again, upon the same evidence if I choose, or upon new evidence, and you have no discretion in this matter. It is not necessary now to repeat that, when an issue has been determined in any other court, if evidence is brought before the Court of Bankruptcy of circumstances tending to shew that there has been fraud, or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to inquire into the validity of the debt. But that the Court of Bankruptcy is bound in every case as a matter of course to go behind a judgment is a preposterous proposition. There is no statute which imposes any such obligation

(1) 16 Q. B. D. 315.

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on the Court of Bankruptcy; s. 7 does no more than give a judicial discretion.

The decision of the registrar was quite right.

FRY, L.J. I am entirely of the same opinion. The appeal is put on two independent grounds. The first is, that the registrar, under sub-s. 4 of s. 7, ought to have stayed the appeal pending the appeal against the judgment. But sub-s. 4 throws on the person who applies for a stay the burden of shewing a reason for it; the sub-section does not say that there shall be a stay unless the Court shall be of opinion to the contrary, but that there shall be a stay "if the Court thinks fit." It lies on the applicant to shew a reason for the stay, and no sufficient reason has been shewn in the present case.

The second ground is, that there is a "sufficient cause" within sub-s. 3 why a receiving order should not be made. It is suggested that some of the issues which were tried before Mathew, J., were wrongly decided, and that the registrar was bound to try them over again. In my opinion there was no such obligation. It is true that in some cases the Court of Bankruptcy has gone behind a judgment, when it has been obtained by fraud, collusion, or mistake. But this power has never, so far as I am aware, been extended to cases in which a judgment has been obtained after issues have been tried out before a Court. I entirely agree with what was said by the Master of Rolls in *In re Saville* (1): "It seems to me that the case of *Ex parte Lennox* (2) shews, that the mere fact of a judgment having been recovered does not prevent the Court of Bankruptcy, if sufficient reasons are given for doing so, from going behind the judgment. But it does not decide that, there being a judgment, on the mere suggestion of the debtor that the judgment is bad, the Court of Bankruptcy is bound to go behind the judgment and inquire into the validity of the debt." In the present case I think no "sufficient cause" was shewn calling on the registrar to inquire into the validity of the debt.

LOPES, L.J. On the first point, that the mere lodging of an appeal against the judgment rendered it obligatory on the

(1) 4 Morrell 1 Bky. Rep. 277, at p. 279. (2) 16 Q. B. D. 315.

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registrar to stay the petition, I have really nothing to add; it is clear that it did not. Such a contention is opposed to the words of sub-s. 4, and to the decision in *Ex parte Heyworth*. (1) On the other point also, I entirely agree with the other members of the Court. It has been argued that the registrar was bound to hear evidence upon issues which had been already tried by a judge and jury, and that he had no discretion in the matter. In my opinion such a contention cannot be for a moment maintained. Proceedings in bankruptcy are already scandalously long; if this contention were well founded they would be almost interminable. I agree that in cases of mistake, fraud, or miscarriage of justice the Court of Bankruptcy will go behind a judgment, but the present case is not one of that kind.

Appeal dismissed.

Solicitor for debtor: *H. W. Chatterton.*

Solicitors for creditor: *Nash, Field, & Withers.*

W. L. C.

[IN THE COURT OF APPEAL.]

Nov. 2.

IN RE GOLDRING. EX PARTE HARPER.

Bankruptcy—Bankruptcy Notice—Right to issue—Trustee in Bankruptcy of Judgment Creditor—Bankruptcy Act, 1883 (46 & 47 *Vict. c* 52), *s.* 4, *sub-s.* 1 (*g*).

The trustee in the bankruptcy of a judgment creditor is not entitled to issue a bankruptcy notice against the judgment debtor in respect of the judgment debt.

Ex parte Blanchett (17 Q. B. D. 303) followed.

Ex parte Woodall (13 Q. B. D. 479) distinguished.

APPEAL ex parte against the refusal of the registrar to issue a bankruptcy notice against T. W. Goldring, on the application of A. C. Harper.

It appeared that one Nash had recovered judgment against Goldring for a debt. A scheme of arrangement between Nash and his creditors was afterwards approved by the Court of Bankruptcy, Harper being the trustee of Nash's property under that scheme. Harper afterwards applied to the Court for leave to issue

(1) 14 Q. B. D. 49.

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a bankruptcy notice against Goldring in respect of the then unpaid balance of the judgment debt. The registrar refused the application, on the ground that, *Ex parte Blanchett* (1) having decided that the only person, other than the creditor who obtained the judgment, who could issue a bankruptcy notice in respect of it was the legal personal representative of the creditor, it could not be said that the trustee in a bankruptcy was the legal personal representative of the bankrupt within the meaning of that decision.

Harper appealed.

F. Cooper Willis, for Harper. The decision in *Ex parte Blanchett* (1) was only that an assignee of a judgment creditor by express assignment could not issue a bankruptcy notice against the judgment debtor. The principle of that decision does not apply to the trustee in the bankruptcy of the judgment creditor, who is an assignee by operation of law. He stands in exactly the same position as the personal representative of a deceased judgment creditor, and it was held by this Court in *Ex parte Woodall* (2) that such a representative can issue a bankruptcy notice against the judgment debtor, if he has obtained leave to issue execution on the judgment. The personal representative of a dead man takes all his personal property, and is bound to apply it in paying his debts, and the trustee of a bankrupt occupies an analogous position.

LORD ESHER, M.R. The question is whether a bankruptcy notice can be issued against a judgment debtor on the application of the trustee in the bankruptcy of the judgment creditor. What is the position of the trustee in a bankruptcy? He is an assignee of the bankrupt by operation of law, and it was decided by this Court in *Ex parte Blanchett* (1) that a bankruptcy notice cannot be issued by the assignee of a judgment creditor, because he does not come within the words of sub-s. 1 (*g*), which is the only authority for issuing a bankruptcy notice. It is argued that the trustee in a bankruptcy can be brought within the spirit of the subsection by virtue of the decision in *Ex parte Woodall* (2), in which

(1) 17 Q. B. D. 303. (2) 13 Q. B. D. 479.

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it was held that a bankruptcy notice could be issued by the executor of a judgment creditor, if he had obtained leave to issue execution on the judgment. But, when *Ex parte Blanchett* (1) was before this Court, we asked the judges who had decided *Ex parte Woodall* (2) what the principle of their decision was, and in giving judgment in *Ex parte Blanchett* I said (3): "Since we heard the argument yesterday, I have taken the opportunity of asking the judges who decided *Ex parte Woodall* (2) what was their view of the principle of their decision, and, as I expected, they were all of opinion that the ground of their decision was that, inasmuch as the personal representative of a deceased judgment creditor might formerly have been made a party to the record in an action brought by the creditor, such a representative might fairly be said to be within the words of sub-s. 1 (*g*). But they all said that they meant to go no further, and they all agreed that it would be extremely dangerous to carry the words of the sub-section any further."

It cannot be said that the trustee in a bankruptcy stands in the same position as the personal representative of the debtor. The decision in *Ex parte Blanchett* (1) was general—that the assignee of a judgment creditor cannot be brought within the sub-section, and for this purpose there is no distinction between an assignee by express contract and an assignee by operation of law. In order to succeed the appellant must bring his case within the express decision in *Ex parte Woodall* (2), and he has not done so. The decision of the registrar was quite right.

FRY and LOPES, L.JJ., concurred.

Appeal dismissed.

Solicitor: *A. T. Smith.*

(1) 17 Q. B. D. 303. (2) 13 Q. B. D. 479.

(3) 17 Q. B. D. 306.

W. L. C.

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Nov. 22.

[IN THE COURT OF APPEAL.]

FLINT *v.* BARNARD.

Bankruptcy—Composition—How far binding on Creditors—Future and contingent Liabilities—"Debts due and provable in bankruptcy"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 18, *sub-s.* 8.

By the Bankruptcy Act, 1883, s. 18, sub-s. 8, "a composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors, so far as relates to any debts due to them from the debtor and provable in bankruptcy":—

Held, that the debts in respect of which a composition is binding under this section include all debts and liabilities which would be released by an order of discharge in bankruptcy.

THIS was an action to recover a sum of money as rent of certain premises of which the defendant was tenant, and for damages for non-repair, and for not restoring a partition.

It appeared that the defendant was tenant to the plaintiffs under a lease which expired in 1881, and that he continued in occupation after that date, until December, 1886. Prior to that date, on November 22, 1886, a receiving order was made against the defendant under the Bankruptcy Act, 1883. Subsequently a resolution for a composition was agreed to by the creditors, and approved on March 23, 1887.

The plaintiff was not a party to the resolution to entertain a proposal for a composition. He now sued for one quarter's rent due at Christmas, 1886, and for damages for breach of covenant. On an application made by the plaintiff under Order XIV., r. 1, the defendant obtained leave to defend, on payment of a proportionate amount of the rent, calculated from the date of the receiving order to the termination of the tenancy. The case was tried before Stephen, J., without a jury, and resulted in judgment for the plaintiff for the balance of the rent, and a sum of money as damages for breach of the covenants to repair, and to restore a partition that had been temporarily removed.

The defendant appealed.

Oswald, and *Pochin*, for the defendant, after contending that the facts shewed that the defendant had not held over on the terms

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of the lease, argued that the composition was binding on the plaintiff. The Bankruptcy Act, 1883, s. 18, sub-s. 8, enacts that "a composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors, so far as relates to any debts due to them from the debtor and provable in bankruptcy." The learned judge decided for the plaintiff on the ground that these debts did not come within this definition, as, though they were provable in bankruptcy, they were not due at the time when the receiving order was made. It is clear by s. 37, sub-s. 3, that such debts or liabilities would be debts provable in bankruptcy, and released by an order of discharge (s. 30). A composition is intended to be as extensive as a proceeding in bankruptcy, and includes contingent or future liabilities, as for instance liabilities on a current bill of exchange. The expression "debts due" cannot be limited to sums of money demandable as debts at that time, for, from their nature, these would be "provable in bankruptcy," and these words in s. 18, sub-s. 8, would be redundant. By s. 168 a "debt provable in bankruptcy" includes any debt or liability by the Act made provable in bankruptcy, and s. 19 expressly exempts from the operation of a composition any "debt or liability" from which the debtor would not be discharged by an order of discharge in bankruptcy. Sect. 18, sub-s. 8, must be read, therefore, as applying to every debt or liability which would be provable in bankruptcy. Any other way of reading the section necessitates interpolating words to fix the time when the debt is due, such as "due at the date of the receiving order."

In any case the rent was due at the date of the receiving order as it would be apportionable: Bankruptcy Act, 1883, Sched. II., r. 19.

[They referred to *Hardy* v. *Fothergill* (1).]

Etherington Smith, for the plaintiff. The language of s. 18, sub-s. 8, and that of s. 30, relating to a discharge on bankruptcy, are different. The latter expressly includes liabilities, while the former only purports to bind creditors whose debts are due. There is nothing in the other parts of the statute relating to compositions to enlarge the terms of s. 18, sub-s. 8. If a

(1) 13 App. Cas. 351.

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person having a claim against the debtor, either future or contingent, comes in and joins in the resolution as to a composition, he would probably be bound by it when approved, but he cannot be bound except by his voluntary act in taking part in the proceedings.

Oswald, did not reply.

LORD ESHER, M.R. It seems to me that the House of Lords, in *Hardy* v. *Fothergill* (1), has laid down a rule of interpretation, or rather a rule of conduct, for the Court where it has to construe the Bankruptcy Act. It is true that the remarks of the Lord Chancellor relate to the Bankruptcy Act, 1869, but they are equally applicable to the later Act, and may be paraphrased by saying that since the statute 6 Geo. 4, c. 16, till the year 1883, the legislature has been engaged in the effort to exhaust every conceivable possibility of liability under which a bankrupt might be, to make it provable in bankruptcy against his estate and relieve the bankrupt for the future from any liability in respect thereof. If I had to apply that rule of interpretation to s. 18, sub-s. 8, of the Bankruptcy Act, 1883, if it stood alone, I should say that this sub-section was open to an interpretation which would make the relief to the debtor complete instead of partial. If the words of s. 18, sub-s. 8, "so far as relates to any debts due to them," are to be construed in their strictest sense, the words that follow—"provable in bankruptcy"—are not necessary, for such debts must be provable in bankruptcy. If the words are not to be taken so strictly, what is a reasonable interpretation? I think this would be "any claim against the debtor such as would be provable in bankruptcy." Such an interpretation carries out what was said in the House of Lords to be the object of the legislature. I should notice, too, that the scheme is to be binding on all the creditors, and that the word "creditor" in its strictest sense does not include persons other than those to whom the person making the composition stands at that time in the relation of debtor.

The propriety of this mode of interpretation is confirmed by other parts of the statute. Thus, by sub-s. 1 of s. 18, the creditors

(1) 13 App. Cas. 351.

may at the first meeting or any adjournment thereof, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them from the debtor, or a proposal for a scheme of arrangement of the debtor's affairs. It is admitted in argument that this would permit persons who have a claim not yet due to come in, and that in that case they would be bound by a resolution subsequently approved. If so the words have, in that sub-section, a meaning large enough to include other persons than creditors who have debts due to them, and I do not see why there should not be the same result in sub-s. 8.

Sect. 19 excepts from the binding effect of the composition debts or liabilities from which the debtor would not be discharged by an order of discharge in bankruptcy, and this exception seems to me to shew that the legislature has so dealt with the matter as to make sub-s. 8 include liabilities.

Then, as to the mode in which the persons who drew the rules under the Act considered the matter. These rules have the authority of a statute, and rule 208 relates to the case of the acceptance and approval of a composition, and provides that the receiving order shall be thereupon rescinded and the debtor's property given up to him. Such a provision is not consistent with the supposition that when this is done there shall still be claims subsisting against the debtor which should remain in force, and ultimately enable the persons who are entitled to make them to sue for the whole amount of their claim instead of accepting a composition. In such a case judgment would be obtained, and execution might issue against the property which had been handed back to the debtor. This would be entirely to nullify the effect of all that had gone before.

I think, therefore, that applying the rule of interpretation that I first mentioned to this Act, we must construe s. 18, sub-s. 8, as including the liabilities as well as the debts of the debtor, so that when the scheme is accepted and proved he would get the same absolute relief as is given by a discharge in bankruptcy. The view the learned judge took is perhaps more grammatical, but for the reasons I have given I cannot agree with it, and I think the appeal must be allowed.

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FRY, L.J. I also find myself unable to agree with the learned judge.

We have to construe s. 18 of the Bankruptcy Act of 1883, which provides for a composition or scheme of arrangement. Such a composition is to be in satisfaction of the debts due to the creditors from the debtor, and these words seem to shew that the composition is to be co-extensive with the obligations of the debtor. Sect. 18 must be read and interpreted with reference to the other sections and to the scheme of the Act. I turn to s. 30, and there I find that an order of discharge is to release the bankrupt from all debts proveable in bankruptcy, except certain debts mentioned in sub-s. 1, such as a debt on a recognizance, debts to the Crown, and some other debts of a public nature, or "any debt or liability incurred by any fraud or fraudulent breach of trust to which he was a party, nor from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party." Therefore we have here given to the expression "debt" a far larger meaning than its strict and primary one, so that it includes not merely present debts, but liabilities that may mature into debts. In the same way the expression "creditors" must in many cases in this Act receive a large interpretation, so as to include every one in relation to whom there is a debt or liability on the part of the debtor. Thus the creditors who may assent to a composition are the persons who have any claim arising by way of a debt or liability to them from the debtor. I might pursue this inquiry further, but it seems to me sufficient to point out that under s. 18, sub-s. 6, the Court has to consider whether the terms of the composition are calculated to benefit, not the creditors who have agreed to it, but the general body of creditors—that is, all creditors, and not a limited portion of them; so when we come to sub-s. 8 we find that the composition is to be binding on all the creditors, and if those words are to be read in the same sense as that I have given to them in the earlier sub-sections, they include all persons who are capable of proving that there is some debt or liability from the debtor to them.

It has already been pointed out that, if the word "debts" is to be limited to debts due at the time the composition is accepted, such

debts would from their very nature be proveable in bankruptcy, and the addition of those words would be tautologous.

But the matter does not entirely rest there, for, though I do not propose to go through them, the subsequent sub-sections indicate that the operation of a composition is to be co-extensive with that of bankruptcy—a conclusion which is confirmed by s. 19.

Sect. 20 is not without importance, because on the approval of a composition the receiving order, by rule 208, is to be rescinded. If it be true that a composition covers a less area than a bankruptcy, there would seem to be no answer to the question why the bankruptcy proceedings should not be continued so far as relates to the balance of liabilities not affected by the composition. I come therefore to the conclusion, on consideration both of the particular words of the sub-section and on the general scheme of the Act, that I ought not to put a construction on this clause which would make a composition effective and binding in respect of one class of creditors and not in respect of another class.

LOPES, L.J. I am unable to read the expression "debt," used in s. 18, sub.-s. 8, of the Bankruptcy Act, 1883, in the same strict and limited sense as that adopted by Stephen, J. I think the section was certainly intended to give as extended relief to a compounding debtor as a discharge in bankruptcy gives to a bankrupt. Sect. 19 appears to me to shew this very clearly; but, without going through the sections which have already been referred to, they all seem to me to point to this, that a composition or scheme of arrangement was to deal with all the debts or liabilities of the debtor, and that consequently the expression "debts," in s. 18, sub-s. 18, is to be read in a general sense, and is not to be confined to such obligations on the part of the debtor as are in existence as debts, properly so called, at the time when the composition is approved.

Appeal dismissed.

Solicitor for plaintiff: *Adrian Young.*
Solicitor for defendant: *George Johnson.*

A. M.

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Oct. 29.

THE QUEEN *v.* SHEPLEY AND ANOTHER (JUSTICES) AND BRIDGE.

Poor Law—Election — Assistant-Overseer—Appointment by Justices—Power to review Election—58 *Geo.* 3, *c.* 69, *ss.* 1, 2, 3—59 *Geo.* 3, *c.* 12, *s.* 7.

By 59 Geo. 3, c. 12, s. 7, it shall be lawful for the inhabitants of any parish in vestry assembled to nominate and elect any discreet person to be assistant-overseer of the poor . . . . and it shall be lawful for any two justices of the peace by warrant to appoint any person who shall be so nominated and elected to be assistant-overseer:—

Held, that after a person has been in fact nominated and elected by the vestry as assistant-overseer, the justices must issue their warrant for his appointment and that they have no power under the above section to inquire whether he has been duly elected.

RULE calling on the respondents, two justices of Derbyshire and James Bridge, to shew cause why the justices should not issue a warrant to appoint David Massey to be assistant-overseer of the poor of the parish of Glossop, pursuant to 59 Geo. 3, c. 12, s. 7.

It appeared that at a meeting of the inhabitants of the parish in vestry Massey and Bridge were nominated as candidates for the office of assistant-overseer of the poor. After a show of hands, a poll was demanded. The poll was subsequently held, votes were given and counted, and the chairman declared the result to be a majority of two votes for Massey, and that he was elected. An application was afterwards made by the overseers of the parish to the respondent justices to issue their warrant of appointment of Massey as such assistant-overseer, and the minutes, duly taken and signed by the chairman of the meeting, were produced to the justices, who, notwithstanding objection on the part of Massey that they had no jurisdiction, heard evidence which shewed that votes had been allowed to certain ratepayers in excess of the number to which they were entitled. The justices ultimately refused the application, on the ground that Massey was not duly elected by reason of the chairman not having in all cases allowed the proper number of votes to each voter.

Asquith, for the respondents, shewed cause. By 59 Geo. 3, c. 12, s. 7, it shall be lawful for the inhabitants in vestry assembled to nominate and elect an assistant-overseer, and for

two justices by warrant to appoint any person "who shall be so nominated and elected to be assistant-overseer." The justices have power, therefore, to inquire whether such person has been "so elected," and may review the election. If their duty is simply ministerial, and they are bound to issue their warrant on proof only of the fact of election, there is no remedy for an invalid election. The office becomes full upon the appointment by warrant, and it is not one in respect of which quo warranto lies, as it is held at the pleasure of the vestry. The result would follow that an assistant-overseer might be elected by a minority of votes, and still be irremoveable. The absence of any other remedy shews the intention of the legislature to entrust the justices with the power of review.

R. C. Glen, in support of the rule, was not heard.

LORD COLERIDGE, C.J. I have no doubt that the justices were without jurisdiction. The elections of churchwardens and parish officers are to be conducted under 58 Geo. 3, c. 69, by which notice of a meeting of the inhabitants in vestry of a parish must be given; and, by s. 2, "In case the rector, or vicar, or perpetual curate shall not be present, the persons so assembled in pursuance of such notice shall forthwith nominate and appoint by plurality of votes, to be ascertained as hereinafter is directed, one of the inhabitants of such parish to be the chairman of and preside in every such vestry"; and I suppose the manner of ascertaining the plurality of votes is prescribed by s. 3, which gives to every inhabitant rated below 50*l.* one vote, and to every inhabitant rated at or over 50*l.* one vote for every 25*l.* of rateable value, so nevertheless that no inhabitant shall be entitled to give more than six votes.

The argument presented to us would equally apply to the appointment of a chairman, and it might be said that if the plurality of votes were improperly ascertained by whoever ought to ascertain it the whole meeting would be inoperative, and therefore two justices are to be at liberty to inquire into the propriety of the appointment of the chairman of the meeting, and, if it were improper, the person elected at the meeting would be improperly elected. But the meeting is convened, and a chair-

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Lord Coleridge, C.J.

man appointed, and s. 2 further provides that "minutes of the proceedings and resolutions of the vestry shall be entered in a book and signed by the chairman and by such other of the inhabitants present as shall think proper to sign the same." These provisions seem to have been all duly fulfilled. The chairman sets out the minutes of the meeting in his affidavit, and ends by saying that there was a count, and he declared David Massey duly elected to the office of assistant-overseer. Then the application was made to the justices, who claim to inquire into all the proceedings of the vestry. It is argued that they are empowered to enter into such inquiry under 59 Geo. 3, c. 12, s. 7. But in my opinion all they had to inquire into was whether the provisions of the statute had been complied with, whether there had been a duly convened meeting, and it had proceeded according to the forms of law, and whether the candidate was elected by that meeting. The minutes, properly signed by the elected chairman, were before the justices; those minutes certified that David Massey was duly elected. I think it was shewn that he was duly elected, and the justices had no more to do than to issue their warrant. The fact that there may not be any mode of appealing against such election is by no means conclusive to shew that the justices may review it, because until quite lately there was no way but the cumbrous process of quo warranto by which the decision of the presiding officer on an election to the important office of member of the local board of health could be questioned. I give no opinion as to what would be the consequence if a person not duly elected were to act as assistant-overseer in a way which made him responsible, and it turned out that he was not duly elected, for that case is not before us.

GRANTHAM, J. I am of the same opinion. Although not absolutely in point, the case of *Skingby* v. *Gurridge* (1) bears on the question under discussion, whether the appointment by the vestry must in the present case be taken to be good. There an assistant-overseer had been appointed, and the minutes of the meeting were taken to the justices, and they appointed him. It

(1) 1 M. & W. 503.

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appeared that the minutes did not specify the duties to be performed, and as by 59 Geo. 3, c. 12, s. 7, the vestry must state his duties, it was contended that it must be assumed the vestry did not state the duties, and the appointment was bad; but Parke, B., said (1): "The minutes of the vestry were given in evidence, and contained a memorandum of the appointment of Till to be assistant-overseer generally, and without qualification." Consequently the Court held that the appointment by the justices was good.

Order absolute.

Solicitors for applicant: *Wilkins, Blyth, & Dutton.*
Solicitors for respondents: *Sharpe, Parker & Co.*

J. R.

STUMM *v.* DIXON & Co. AND KNIGHT.

Nov. 21.

Practice — Supreme Court — Costs—Joint Defendants in Action of Tort — Defendant severing in his Pleading—Verdict against both Defendants— Costs of separate Pleading— Taxation.

In an action of tort against two defendants, they pleaded only payment into court, to which the plaintiff replied denying the sufficiency of the payment. One of the defendants afterwards obtained leave to amend by severing in his defence, and added separate defences accordingly. At the trial the plaintiff recovered a verdict against both defendants for an amount beyond that paid into court. On taxation of costs the master allowed the plaintiff the general costs of the action and trial as against both defendants, but the costs occasioned by the separate pleading of the one defendant as against him alone:—

Held, that the taxation was right.

MOTION referred by Denman, J., from chambers, to review a taxation of costs.

It appeared from the certificate of the taxing master that the plaintiff brought an action for withdrawing support from his land and shop against the defendant Knight, the owner of adjoining premises, and Dixon & Co., contractors. The defendants pleaded jointly payment into court only. The plaintiff replied taking issue on the sufficiency of the payment. The defendants Dixon & Co. subsequently changed their solicitor, and after making applications at chambers, and obtaining leave to amend their

(1) 1 M. & W. at p. 515.

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defence, amended it by adding defences denying all the allegations in the plaintiff's claim. The defendant Knight's defence was never altered. The case went to trial before an official referee, who found a verdict for the plaintiff for 130*l.*, beyond the 50*l.* paid into court, against both defendants. The costs were taxed, and the master certified that he allowed the plaintiff, as against Knight, all the costs of the trial and action, except those occasioned by and in consequence of Dixon & Co.'s pleading, which the master thought Dixon & Co. alone should be liable for, and that Knight should not pay costs incurred by Dixon & Co. going to another solicitor and placing false pleas on the record without the consent or knowledge of Knight.

The items of costs in question were for instructions and fees to counsel to oppose the summons at chambers to amend Dixon's defence, and to settle amended reply, and advise on evidence to meet the new defence, with attendances, notices to admit and produce, inspection of documents, &c., &c., incidental thereto.

Le Riche, in support of the motion. When a plaintiff has recovered one judgment with costs against two tortfeasors who have severed in their defence, the master cannot sever the costs and direct that one defendant shall pay only part and the other the rest. There is no authority for such a mode of taxation. The invariable practice is to tax the whole costs against both defendants. If the plaintiff has suffered wrong from two defendants, he should be fully indemnified by both. The practice before the Judicature Acts was that, "where there are several defendants who obtain judgment in the action, the plaintiff may pay costs to which of them he pleases; and when they fail, each defendant is liable for the whole costs; but if, after satisfaction from any one, the plaintiff takes out execution against another, such defendant may apply to the Court:" 1 Chitty's Archbold's Practice, 12th ed. p. 498, citing *Wilson* v. *Foote*. (1)

There is no apportionment of costs in a common law action See per Jessel, M.R., *Real and Personal Advance Company* v *McCarthy* (2). [He cited also *Betts* v. *De Vitre* (3), and *Heatley* v. *Newton*. (4)]

(1) Bull N. P. 335, c.
(2) 18 Ch. D. 362, at p. 368.
(3) 15 W. R. 701.
(4) 19 Ch. D. 326.

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Witt, for the defendant Knight. There is no authority on the point. The defendant Knight is made liable for the general costs, but the master has rightly disallowed as against Knight the costs of the contest between the plaintiff and Dixon & Co. from the time of the severance in defence until the trial. [He was stopped.]

LORD COLERIDGE, C.J. In my opinion the order of the master was correct. We are told that there is no authority for it. There may be no direct authority, but there is authority which indirectly bears on the present point, and shews that where there are several defendants, some of whom succeed and some fail, those that succeed in their defence—although they may be liable to some portions of the general costs of the cause if their defences do not go to the whole cause of action—are entitled to recover from the plaintiff the costs of those issues on which they have succeeded and the plaintiff has failed. That is manifestly just. This shews that although there may be a general verdict against a number of defendants in respect of some portions of the cause of action, yet that the defendants who have succeeded on part of the issues are entitled to the costs of those issues on which they have succeeded, to be set off against the general costs of action to which they are liable. The point we have to decide is, whether, where two defendants have failed on the general cause of action, and are therefore properly liable to the general costs, and one defendant has, independently of the other, severed in his defence, and been beaten on his separate defence, the costs of this separate defence should be taxed against him alone. It is well established that if he had succeeded he would be entitled to recover them against the plaintiff alone. See Gray on Costs, p. 95, and the cases cited. It is conceded that if the defendants Dixon & Co. had succeeded on those issues they would be entitled to their costs without reference to Knight, who has failed on the general cause of action. It seems to follow by parity of reasoning that Dixon & Co., who have set up a distinct defence on which they have failed, should alone be liable for the costs of that in which they have failed. It is right in principle, quite just, and borne out by analogy.

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MANISTY, J. The case is of importance, and without authority upon it. I think that the learned master was perfectly right. Suppose an action against A. and B. A pleads payment into court; B. denies his liability and pleads a matter of defence. At the trial A. fails, but B. succeeds, and is entitled to recover his costs as against the plaintiff. Is it to be said that this is a joint matter, and that A., who has nothing to do with those costs, and has no right to any of them, is entitled to recover them from the plaintiff? That would, indeed, be a strong proposition. It is said that it is a case of apportionment. But it is not. We are dealing with the rights of the parties, and in this case I think the master was perfectly right in saying that the plaintiff was entitled, as against the defendant Knight, to all the costs of the action and trial, except the costs of Dixon & Co's individual pleading, as to which Dixon & Co. alone are liable. That is just, and according to law.

Motion dismissed.

Solicitor for plaintiff: *C. J. Foster.*

Solicitors for defendant Knight: *Saunders, Hawksford, Bennett, & Co.*

J. R.

VAGLIANO BROTHERS *v.* GOVERNOR AND COMPANY OF THE BANK OF ENGLAND.

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June 27, 28;
July 4, 5, 6, 7;
Nov. 2.

Bill of Exchange—Estoppel—Negligence—Banker—Forgery of name of Payee—Payee "a fictitious or non-existent person"—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 7, *sub-s.* 3.

In an action by the plaintiffs for a declaration that the defendants, their bankers, were not entitled to debit them with the amount of certain forged bills of exchange, it appeared that V., a foreign correspondent of the plaintiffs, being in the habit of drawing upon them, sometimes making the bills payable to the order of C. P. & Co., another foreign firm, a clerk in the plaintiffs' employment, forged the signature of V. to bills purporting to be drawn on the plaintiffs by V. to the order of C. P. & Co., and resembling those which V. was in the habit of drawing on the plaintiffs, and placed among the plaintiffs' correspondence counterfeit letters of advice with respect to these bills resembling those ordinarily received from V. By these means the clerk procured the genuine acceptances of the plaintiffs to the bills which he had forged. He then forged upon the bills indorsements purporting to be those of C. P. & Co., the payees named therein, and was paid by the cashiers of the defendants across the counter the amounts for which the bills were drawn :—

Held, by Charles, J., that the defendants were not protected by s. 7. sub-s. 3, of the Bills of Exchange Act, 1882, as C. P. & Co. were not "fictitious or non-existing" payees within the meaning of the sub-section; that the plaintiffs had not been guilty of negligence immediately connected with the transactions so as to disentitle them to recover; and that the defendants were not entitled to debit the plaintiffs with the amount of the forged bills paid as above mentioned.

Case tried before Charles, J., without a jury. The following statement of the facts is taken from the judgment :—

In this case the plaintiff, who trades under the name of Vagliano Brothers, claims that it may be declared that he is entitled to be credited by the defendants, the Bank of England, with the amount of £71,500 alleged by him to have been wrongfully and without his authority debited to his account. The cause was tried before me during last Trinity sittings, when the following facts were proved :—

The plaintiff has for many years carried on a very large business in London as a merchant and foreign banker, formerly in partnership with his brothers, and alone since May 14, 1887, when the firm, as previously constituted, was dissolved. His transactions with the defendants, his bankers, had, prior to November, 1887, when his account was closed, been for a long period of great

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magnitude. In 1886, for example, payments were made by them on his account or that of his firm amounting in number to about four thousand and in value to about three millions and a half; and in 1887, between January and November, to almost the same extent, both as regards number and value.

The plaintiff employs a considerable number of clerks at his office in London, amongst whom there was, from May 10, 1882, until October 11, 1887, one Anthony Isidor Glyka. For a twelve-month he was paid no salary, but afterwards was remunerated at the rate of £15 per month. With another clerk, named Copchili, he managed the foreign correspondence of the firm, and during the whole period of his employment the plaintiff had entire confidence in him and had no reason whatever to suspect his integrity. Between February and August, 1887, however, Glyka, who had been speculating enormously on the Stock Exchange, had, in fact, in order to meet his engagements there, by a series of elaborate and ingenious frauds obtained the plaintiff's acceptance to forty-three bills, of which he received payment from the defendants to the amount of 71,500*l.*

The question in the present action is whether the Bank or the plaintiff is to bear the loss of this sum, and inasmuch as one contention of the defendants is that the plaintiff has, by his own negligence in reference to these transactions, disentitled himself from recovering, it is necessary to examine in detail the general course of business in the plaintiff's office, and also carefully to consider the manner in which Glyka succeeded in perpetrating his frauds without detection.

The plaintiff, had, in various parts of the world, a large number of correspondents, who were in the habit of drawing bills on him from time to time, sometimes consigning goods against the bills, and sometimes making direct remittances in money. The bills were ordinarily, but not by any means invariably, drawn in sets of two, one being headed "solely for acceptance," and the second, intended for negotiation, bearing the indorsements of the various holders through whose hands it might have passed. In case of only one bill being drawn the indorsements would, of course, be upon its back. The correspondents were in the habit of advising the plaintiff by letter of their having drawn upon him, giving in

each instance the particulars of the draft. These letters of advice, which were for the most part in the Greek language, were generally opened by Glyka or Copchili, and placed by one or other of them before the plaintiff. When he had read them they were brought back to the clerks' office, and after having had a summary in English indorsed on them by one or other of the correspondence clerks were handed to a clerk, whose duty it was to enter the particulars in a book called the "bills payable" book, and if payable after sight in a book called the "sight bill" book. Particulars were also entered in a book called the "bills due" book. In due course the bills themselves would reach the hands of the London agents of the payees, by whom those headed "for acceptance only" would be brought to the plaintiff's office and there dropped for acceptance into a box at the door marked "for bills only." At 4 P.M. every day this box was cleared by the clerk who kept the "bills payable" book. He would then compare the bills with the particulars in the "bills payable" book, and, if in order, would stamp across them the words "accepted, payable at the Bank of England," and in writing add the number, date of acceptance, and date when due. In this condition the practice was to take them to the plaintiff's room for acceptance, and they were then accepted by him. On an average from ten to fifteen bills per day would be thus dealt with. Having been signed they were placed in a portfolio in a basket, from which they were subsequently taken and given up to those who called for and described them. When the clerk placed the stamp across a bill he was in the habit of noting in the "bills book" the name of the agent who had left it, if, as often happened, that name was stamped on the bill. If not, he used to attach a slip to the bill directing the clerk who delivered it out to get the name, and from the slip so filled-up would make his note. An accepted bill being thus taken away by the agent of the payee would be placed with the second of the set, if there was a second, and then would be presented with or without the second, as the case might be, at the Bank of England for payment. In most cases they would be presented through a banker, but sometimes, though rarely, they were paid across the counter. Meanwhile the Bank would, in the ordinary course of business, have been advised by

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the plaintiff of the bills coming forward for payment. This was done at the commencement of each month. Thus, for example, on February 28, 1887, the following letter was written :—

"19 Old Broad Street, London, E.C., Feb. 28, 1887.

"Vagliano Bros.' List for March inclosed.

"The Cashiers of the Bank of England.

"Gentlemen,—Herewith we beg to hand you our list of acceptances falling due next month and made payable with you; which be good enough to pay at maturity and debit our account.

"Yours truly,

"Vagliano Bros."

Inclosed, in the instance selected, was a list taken from the "bills payable" book of 142 bills, containing in each case the date of the bill, its number, the drawer's name and residence, the date when due, and the amount. With regard to bills which might come forward and be payable during the currency of the month, but which had not been included in the monthly list, a special note of advice in similar terms was always sent. The bills after being paid at the Bank were returned at intervals of about a week with the pass book, which indicated by numbers, but not otherwise, the payments which had been made. The cashier of the firm then checked the bills with the pass book and with the entries in his cash book in order that he might be satisfied that the bills entered by him as having become due and having been paid on certain days were in fact paid. He was not in the habit of examining the indorsements; indeed his reference to the bills was simply to note their numbers and amounts, and solely for the purpose of verification. After having been checked with the pass and cash books in the manner I have described, the bills were packed up in parcels, labelled, and put away. The pass book, I may here mention, was balanced half-yearly.

Having thus indicated the ordinary routine of business between the plaintiff and defendants, I now proceed to state the method by which Glyka contrived to effect his forgeries.

Glyka had under his management, as one of the foreign correspondence clerks, the correspondence with persons resident in

Russia. Among them was Mr. George Vucina, a merchant and banker in Odessa, who for upwards of twenty-nine years had had constant business relations with the plaintiff's firm. Practically his credit was unlimited, and his drafts on Vaglianos in each year were very numerous, and amounted to many thousands of pounds. Thus, in 1884 he drew for 156,484*l.*; in 1885, for 355,902*l.*; in 1886, for 180,166*l.*; and in 1887, from January 1 to October 29, for 340,000*l.* (excluding the forty-three forged bills). The bills were sometimes drawn to Vucina's order, but far more frequently to the order of a named payee; and here it should be noticed that in 1885 on three occasions, and in 1886 on eleven occasions, Vucina had drawn bills to the order of C. Petridi & Co., a firm carring on business at Constantinople. Glyka, from his position in the plaintiff's office, had no difficulty in possessing himself of specimens of Vucina's genuine letters of advice, and of his genuine bills. Having done so, he had paper prepared identical in texture and general appearance with that on which Vucina's business letters were written, and he also had bills prepared identical in all respects with Vucina's genuine bills. To these he proceeded to forge Vucina's name as drawer with extraordinary skill, and in each case he wrote on the face of the bill the name of C. Petridi & Co. as payees. He then also stamped in each case on the face of these bills the name of F. Pasqua & Son, as indicating the name of the London firm who had left the bill for acceptance. All the forged bills except two, it may be here stated, were drawn at three days after sight; in the two excepted cases, they were drawn at one and two months after date respectively. It was not suggested by the defendants that the forgery of the letters and of the bills was not carried out with the utmost dexterity. The forged advices were, on the face of them, a most careful and elaborate reproduction of the genuine advices, and the forged bills were prepared with equal ingenuity. In no case was the second bill of a set forged; in all cases one bill and one only was presented to the bank—viz., the one marked at the top, "solely for acceptance."

Let me now follow the history of one of these bills; for, following the history of one, we follow the history of all. Glyka, having forged a letter of advice from Vucina with reference to

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the bill, would place it one morning with the ordinary correspondence of the firm. There being absolutely nothing on its face to suggest any doubt as to its genuineness, it would in due time pass into the hands of the clerk whose duty it was to keep the "bills payable" book, and the particulars of the bill contained in the letter would be entered by him in that book. Then Glyka, after allowing a sufficient number of days to elapse, and having prepared and filled in the forged draft in the manner I have described easily found an opportunity of dropping it into the bill-box, whence it would be taken with genuine bills by one of the clerks and compared with the "bills payable" book, and being in order would be stamped with the words "accepted payable at the Bank of England." The number, date of acceptance, and date when due, would be added in writing, and then it would be laid with a number of genuine bills before the plaintiff for acceptance. The back of the bill was at that time blank, while on the face of it there appeared the names of the supposed drawer and payees and London agent of the payees. In every respect, indeed, both as regards the signature of the supposed drawer and otherwise, it so closely resembled a genuine bill as to defy the most careful scrutiny. The plaintiff would accept it along with the rest of the bills almost as a matter of routine, and it would be placed with them in a portfolio to be called for by the supposed Pasqua. From this portfolio, which was left in the room where Glyka actually sat, he had no difficulty in taking it.

By these ingenious means Glyka thus possessed himself of a genuine acceptance to a forged draft. He then proceeded to forge the indorsement of C. Petridi & Co., adding what professed to be their stamp:—"C. Petridi & Co., Constantinople." In all cases but one Petridi's indorsement was to "N. Maratis;" in one case to "B. Maratis," who in his turn was represented as indorsing to "N. Maratis." These names of "B Maratis" and "N. Maratis" were the names of non-existing persons; names invented by Glyka, who, however, in order to give an appearance of genuineness to them, described them as of Constantinople stamping in many instances on the face of the bills the words—'B. Maratis, Constantinople," with a number between the name

of the person and of the place. In every case N. Maratis was named on the back of the bill as the person who received the money from the bank. The forged bills ranged in "due date" from February 18 to October 12, 1887, and in value from 650*l.* to 2500*l.* Up to May 14, a date to which much importance was attached by the defendants, four bills only had been forged, amounting altogether to 3000*l.* They were due respectively on February 18, March 7, April 7, and May 12. Five of the remaining thirty-eight bills came due in June for amounts of which the total was 5000*l.*; eleven in July, for 17,000*l.*; seven in August, for 12,700*l.*; ten in September, for 20,400*l.*; and six in October, for 13,400*l.* During this period the genuine bills drawn by Vucina which became due were between six and seven hundred in number, and the highest amount drawn for was 1000*l.*

All the forged bills were cashed at the bank across the counter, on six or seven occasions by Glyka himself; upon the others by someone employed by him. According to the evidence of Mr. Disney, the principal officer in the private drawing office of the defendants, this was unusual when the amount was large; and the same witness stated that on several occasions between May and October the counter clerks, before paying the bills, had communicated with him. The earliest communication was with reference to a bill for 1000*l.* due on May 12, when Mr. Disney instructed the clerk if the bill was properly advised to pay it. At that time Mr. Ziffo, the outdoor manager of the plaintiff, was almost daily at the bank on the plaintiff's business, fetching securities from boxes of securities deposited there, and cutting off coupons, but Mr. Disney did not mention the circumstance to him. Mr. Ziffo had been on April 7, 1885, authorized to act for Vaglianos in all matters relating to their account at the Bank of England, and to sign for the firm. The authority to sign was cancelled on May 24, and a request was substituted that the Bank would give full access to Mr. Alcibiades Vagliano and Mr. Ziffo to all the boxes, adding that Mr. Ziffo would call daily for the removal of box No. 1. On May 28 the plaintiff gave an authority to Mr. A. Vagliano to act in all matters relating to his account, and to sign for the firm. Mr. Disney at this juncture

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was away for a short time on his holiday, and on his return his attention was again called to the question of these payments over the counter, another bill having been referred to him by a counter clerk. This occurred at some time between the middle and end of June, and he stated in evidence that he did then communicate with Ziffo, who, he said, remarked that if the bills were properly advised he supposed the Bank must pay them. Mr. Ziffo denied that this conversation took place, and swore positively that he never knew of these payments over the counter, which he agreed with Mr. Disney were unusual, indeed, according to him, most unusual, until Glyka was given into custody on October 12. And I see no reason to disbelieve him. Whatever passed between Mr. Disney and himself, it is to my mind clear that Mr. Disney failed to convey to Mr. Ziffo the impression of anything unusual having occurred, and nothing was said or written on the subject either to the plaintiff or to Mr. A. Vagliano, who at that date had received authority to act in all matters relating to the account. Mr. Disney continued, whenever he was referred to, to authorize the counter clerks to pay across the counter bills similarly indorsed until October 12, making no inquiry as to who the Maratis named in the indorsement was, nor as to the persons who from time to time brought the bills to the Bank. On October 11 it was discovered that Glyka had forged the plaintiff's name as acceptor to two drafts. This led to an investigation of his accounts, and to the detection of his other forgeries. He was at once arrested, and afterwards upon his trial pleaded guilty to the forgeries of the bills now in question, and was sentenced to ten years' penal servitude.

Sir R. E. Webster, A.G. (with him *H. D. Greene, Q.C.*, and *Arbuthnot*), for the defendants. First, the defendants are protected by the Bills of Exchange Act, 1882, s. 7, sub-s. 3, which enacts that "where the payee" of a bill of exchange "is a fictitious or non-existent person, the bill may be treated as payable to bearer." Before the passing of the Act the acceptor of such a bill was only liable to a bonâ fide holder for valuable consideration in cases in which it could be shewn that the name of the payee was fictitious to the knowledge of the acceptor: *Gibson* v.

Minet (1); *Phillips* v. *Im Thurn* (2); Byles on Bills, ed. 12, note to p. 83. The sub-section says nothing as to the knowledge of the acceptor, and it is submitted that it must be taken that the legislature intended to modify the existing law, and that the forged bills must now be treated as payable to bearer, though the plaintiffs when they accepted them did not know that C. Petridi & Co., in whose favour they were purported to be drawn, were, if not "non-existent," at least "fictitious payees."

The word "fictitious" in the sub-section must mean "fictitious" with respect to the occasion. This Messrs. C. Petridi & Co. were, for the use of their name was part of the fraud of Glyka. The fact that a firm bearing the name existed at the time of the forgeries cannot affect the question. The legislature could not have intended that the mere circumstance that a person bearing the name of the payee of a forged bill really existed should alter the liability of the acceptor. In *Cooper* v. *Meyer* (3) a decision before the passing of the Act, where the names of existing firms were indorsed on bills of exchange without the authority of the firms, Lord Tenterden treated the indorsements as fictitious.

Secondly, the facts shew that there was such negligence on the part of the plaintiffs as to be in law the direct cause of the loss of the money. There was no effectual supervision of Glyka, and upon any careful examination of the plaintiffs' books and correspondence his frauds must have been discovered. There were several circumstances which should have excited suspicion. The forged letters did not form a sequence with the genuine letters of Yucina. They were shorter than the genuine letters, and they were not, as were the genuine letters for the most part, dated both in the old and the new style. There was also no entry of them, as of the genuine letters, in the letter book. The forged bills were for larger amounts than the genuine bills, and had not, like most of the genuine bills, a second part. These facts, taken together, are enough to bring the case within *Young* v. *Grote* (4), *Bank of Ireland* v. *Evans's Trustees* (5), and *Merchants of the Staple* v. *Bank of England.* (6)

(1) 1 H. Bl. 569.
(2) Law Rep. 1 C. P. 463.
(3) 10 B. & C. 468.
(4) 4 Bing. 253.
(5) 5 H. L. C. 389.
(6) 21 Q. B. D. 160.

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Thirdly, the plaintiffs' pass book contained entries of these sums on the debit side, and was balanced at the end of the half-year. An account was thus stated between the plaintiffs and the defendants which cannot now be opened: *Woods* v. *Thiedemann.* (1)

Sir C. Russell, Q.C. (with him, *Finlay, Q.C.*, and *F. W. Hollams*), for the plaintiffs. The plaintiffs are entitled to recover. First, C. Petridi & Co., the payees of the forged bills, were not "non-existent or fictitious persons" within the meaning of the Bills of Exchange Act, 1882, s. 7, sub-s. 3. They were an existing firm. "Fictitious persons" does not mean persons whose signature has been forged. Had the bills been genuine they would have been drawn by Vucina, a real person to the plaintiffs' knowledge, in favour of C. Petridi & Co., a real firm to the plaintiffs' knowledge, and would have been accepted by the plaintiffs as such. All this was suggested to the plaintiffs by the forgery of the signature of Vucina and C. Petridi & Co., and the plaintiffs in consequence accepted the forged bills. They would not have accepted them had they believed either signature to be fictitious. The sub-section was merely declaratory of the existing law. Sect. 60, reproducing 16 & 17 Vict. c. 59, s. 19, specially protects a banker who as drawee in good faith pays a cheque payable to order which is held under a forged or unauthorized indorsement. There would have been no occasion for this special provision if the banker were already protected under the general terms of s. 7, sub-s. 3.

Secondly, as to negligence, the cases cited shew that the defendants are not protected, unless there was a want of reasonable care on the part of the plaintiffs in the transaction out of which the loss has arisen, and unless this want of reasonable care was the direct cause of the loss. There is nothing to shew that the business of the plaintiffs was not conducted with a reasonable amount of precaution against fraud, and there can be no doubt that the fraud which in this case led to the loss was carried out with great ingenuity. If there was negligence anywhere it was on the part of the cashiers of the defendants in paying the bills without making inquiries as to their genuineness. It is pointed out by

(1) 1 H. & C. 481.

Parke, B., in *Robarts* v. *Tucker* (1) that bankers "may require their customers to domicile their bills at their own offices, and to honour them by giving a cheque on the banker."

Cur. adv. vult.

1888. Nov. 2. CHARLES, J. (the learned judge stated the facts as above, and proceeded). The defendants, under these circumstances, contended that they were under no liability on two grounds. First, they submitted that they were protected by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 7, sub-s. 3), which enacts with reference to bills of exchange that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." If the bills in question were to be so treated it was not disputed that the plaintiff would fail, for the person who presented them at the bank would be entitled in that case to be paid the amounts of the bills by the Bank, and the Bank would be justified in debiting their customer with these payments. The point discussed, therefore, was whether the payees named in the bills were "fictitious or non-existing" within the meaning of the statute.

Now, in each case the payees named were the firm of C. Petridi & Co., real and existing persons, actual correspondents at Constantinople of Vaglianos, who had, moreover, on previous occasions been made payees of genuine bills drawn by Vucina on Vaglianos. But although they were thus, in fact, real and existing, it was suggested that they were fictitious or non-existing as regards these transactions; fictitious or non-existing with reference to these bills which Glyka never intended that they should indorse, and which Vucina, who was the supposed drawer, had not really drawn to their order. It was true, the Attorney-General argued, that there was a firm of their name in existence, but it could not be that the mere selection by the forger of a name actually borne by somebody could make a difference. In my judgment, however, a distinction must be drawn, in construing the Act of Parliament, between the forged signature of a real person and the signature of a fictitious person. The distinction is recognised, I may observe, in many decided cases, as for example in *Beeman* v.

(1) 16 Q. B. 560.

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Duck. (1) The language of the sub-section itself seems to me to require this construction, and other provisions in the Act to which I will presently refer point, in my opinion, in the same direction. But before referring to them I will shortly state what the law formerly was as to bills of this description.

If they were drawn payable to the order of fictitious or non-existing payees to the knowledge of the acceptor, the bonâ fide holder for value could recover against him as upon a bill payable to bearer. This was so decided in *Gibson* v. *Minet* (2), where, as in many subsequent cases, the knowledge of the facts by the acceptor was treated as essential. The same rule was recognised in *Phillips* v. *Im Thurn* (3), where the defendant had accepted the bill sued on for the honour of the supposed drawers; and in all the decided cases the payee was fictitious or non-existing in the sense that no indorsement by him was contemplated by the acceptor. It might be that the name selected was one actually borne by somebody somewhere. It was so, for instance, in *Cooper* v. *Meyer* (4), where a bill, drawn in the handwriting of one Darby, in the names and to the order of two persons called Woodman and Ullock & Co., was treated as a bill drawn and indorsed by non-existing persons, though it appeared there were in existence individuals bearing these names. But with regard to the acceptor, who either knew or ought to have known the handwriting of the drawers, they had as drawers or indorsers no existence, and he was therefore, in the opinion of the Court, to be considered as undertaking to pay to the signature of the person who actually drew the bills. Fictitiousness or non-existence, it may be conceded, did not depend merely upon the selection of a fictitious or non-existing name. The test was to be found in the intention of the acceptor, and I do not think the statute, although it says nothing expressly about the acceptor's knowledge, has in this respect made any alteration. If the payee is non-existing, that is to say, if no one is known to exist answering to the name and description used, the bill is to be treated as one "to bearer." And if a name and description is adopted which does happen to fit an existing person, still if acceptor does not

(1) 11 M. & W. 251.
(2) 1 H. Bl. 569.
(3) Law Rep. 1 C. P. 463.
(4) 10 B. & C. 468.

intend to pay to the actual order of the named payee, and knows that he is in that sense fictitious, the bill is also to be treated as "to bearer." Now, in the present case I think it impossible to hold that C. Petridi & Co. were in this sense either fictitious or non-existing. The purpose of their names being inserted is obvious. It was that the plaintiff might be the more effectually deceived. The name was familiar to him as that of a firm which had in many previous instances been payees named by Vucina of bills drawn on Vaglianos, and by accepting a bill drawn in their favour the plaintiff, according to s. 54 of the Act of 1882, which simply in this respect re-enacts what was already the law, first engaged that he would pay according to the tenor of his acceptance, and, secondly, was precluded from denying to a holder in due course the existence of the payees and their then capacity to indorse, but not the genuineness or validity of the indorsement. Suppose that C. Petridi & Co. had, in fact, indorsed one of these forged bills. It would have been competent to them by such an indorsement to make a good title to a bonâ fide holder for value, to whom the plaintiff must have paid the bill. How, then, can it be said that C. Petridi & Co. were "fictitious or non-existing?"

A consideration of the history of the responsibility of banks with relation to cheques confirms, I think, the correctness of the view which I have taken of s. 7, sub-s. 3. Cheques, until the passing of 16 & 17 Vict. c. 59, were always payable to bearer, and a banker who paid one was not liable, provided it was regularly drawn, even though the bearer might have stolen it or obtained it by fraud. But when cheques were introduced payable to "order," the bankers' responsibility with reference to them was enlarged. For a cheque payable to order is a bill of exchange payable to order on demand, and in the absence of some statutory provision to the contrary, it would have been the banker's business to see that it was paid to the proper indorsee. The 19th section of the above-mentioned statute relieved banks from liability by enacting "that any draft or order drawn upon a banker for a sum payable to order on demand which shall be presented for payment, purporting to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient

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authority to such banker to pay such draft to the bearer or holder thereof, and it shall not be incumbent on such banker to prove that such indorsement or any subsequent indorsement was made by or under the authority or direction of the persons to whom the said draft or order was made payable either by the drawer or any indorser thereof." This enactment was substantially reproduced by s. 60 of the Act of 1882, which provides that when a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to shew that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority." Now here is to be found a special privilege and protection extended to bankers in the case of a bill of exchange payable to order on demand. But if the defendants' construction of the words "fictitious or non-existing" in s. 7, sub-s. 3, is the correct one, no such special privilege or protection would be required.

Who, then, in the absence of any statutory provision, is to bear the responsibility or risk of a forged indorsement of an existing named payee? Is the bank to bear it or the customer? The answer is that the bank must bear it. That this is so seems clear from a consideration of the effect of making an acceptance payable at a banker's; a matter which was fully considered in *Robarts* v. *Tucker*. (1) It was there held in the Exchequer Chamber that the acceptance of a bill of exchange payable at a banker's is tantamount to an order to the banker to pay the bill to any person who according to the law-merchant can give a valid discharge for it. Therefore, if the bill is payable to order, it is an authority to pay the bill to any person who becomes the holder by a genuine indorsement. "The bankers," says Parke, B. (2), in his judgment cannot charge their customer with any other payments than those made in pursuance of that authority." They cannot debit him with a payment made to one who claims through a forged indorsement, and so cannot give a valid dis-

(1) 16 Q. B. 560. (2) At p. 579.

charge for the bill, unless, indeed, there are circumstances amounting to a direction from the customer to the bankers to pay the bill without reference to the genuineness of the indorsement, or equivalent to an admission of its genuineness, inducing the bankers to alter their position so as to preclude the customer from shewing it to be forged. This throws on the bankers the responsibility of deciding on the genuineness of indorsements, a difficult and in many cases an almost impossible task. But if they wish to avoid that responsibility they can adopt the course indicated by Parke, B., in the last-mentioned case: "They may require their customers to domicile their bills at their own offices and to honour them by giving a cheque on the banker." It may further be observed, in answer to the argument of hardship, that in the same case both Maule, J., and Parke, B., appear to have been of opinion that if a bill were presented to a banker by a stranger with an indorsement on it of a person necessary to make out the title but unknown to the banker, the banker would be justified in refusing to pay at once, and would be entitled to time to make reasonable inquiries; see *Robarts* v. *Tucker*. (1)

The first ground of defence therefore, in my opinion, fails, and I have now to consider the second ground relied on by the defendants. It is alleged that the plaintiff has by his conduct disentitled himself from insisting on treating these payments as made without authority; that he has been guilty of such negligence as excuses the defendants; that is to say, of negligence which is the proximate cause of the loss. Mere negligence or a careless and slovenly mode of conducting business would certainly not be enough. The negligence must be in or immediately connected with the transaction itself. The principle to be applied to such cases is laid down by Parke, B., in giving the opinion of all the judges who were summoned to advise the House of Lords in the case of *Bank of Ireland* v. *Trustees of Evans's Charities*. (2) There the trustees of a Dublin charity, incorporated by Act of Parliament and having a common seal, possessed public stock registered in the Bank of Ireland. One Grace, their secretary, was allowed to have the seal in his possession, and took advantage of his position fraudulently and without authority to affix the

(1) 16 Q. B. 560, at pp. 577, 578. (2) 5 H. L. C. 389.

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seal to five powers of attorney authorizing the transfer of the stock. These were presented to the bank and the stock was transferred accordingly, and the produce remitted to Grace. The facts were afterwards discovered and Grace was indicted and convicted. The trustees then duly authorized a transfer of the stock into the name of Johnson, and required the bank to make the transfer. The bank refused to do so, and an action was brought on this refusal. The judge at the trial told the jury that if they believed the evidence offered by the plaintiffs, that the five letters were forgeries, then the verdict ought to be for the plaintiffs, unless they at the same time believed that the use made of the common seal of the trustees, whereby the defendants were imposed upon, was caused exclusively by the negligence or default of the plaintiffs, in which case the verdict must be for the defendants; and further, if the jury in so considering whether the use so made of the common seal of the plaintiffs was the exclusive cause of the imposition and fraud practised on the defendants, should also consider that there was any neglect on the part of the defendants to examine the letters of attorney and inquire into their genuineness, so that such negligence contributed in any degree to the said imposition and fraud, the verdict must be for the plaintiffs. It will be observed that the only negligence proved was a supposed negligent custody of their corporation seal by the trustees in leaving it in Grace's hands, whereby he was enabled to commit the forgeries. Parke, B., in giving the opinion of the judges on these facts, thus expresses himself (1):—

"We all concur in opinion that the evidence given . . . is not sufficient evidence of that species of negligence which alone could warrant a jury in finding that the plaintiffs were disentitled to insist on the transfer being void. We concur with Mr. Justice Jackson and Justices Ball, Crampton, and Torrens, and the Chief Justice Lefroy, in thinking that the negligence which would deprive the plaintiff of his right to insist that the transfer was invalid must be negligence in or immediately connected with the transfer itself. Such was the case of *Young* v. *Grote* (2), on which great reliance was placed in the argument at your Lord-

(1) 5 H. L. C. at p. 409. (2) 4 Bing. 253.

ships' Bar. In that case it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer, having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment. The present case is entirely different. If there was negligence in the custody of the seal it was very remotely connected with the act of transfer. The transfer was not the necessary or ordinary or likely result of that negligence. . . If such negligence could disentitle the plaintiffs, to what extent is it to go? If a man should lose his cheque-book or neglect to lock the desk in which it is kept and a servant or stranger should take it up, it is impossible, in our opinion, to contend that a banker paying this forged cheque would be entitled to charge his customer with that payment. Would it be contended that if he kept his goods so negligently that a servant took them and sold them he must be considered as having concurred in the sale, and so be disentitled to sue for their conversion on a demand and refusal? It is clear, we think, that the negligence in the present case, if there be any, is much too remote to affect the transfer itself and to cause the trustees to be parties to misleading the bank in making the transfer on the forged power of attorney." The principle thus enunciated was adopted by and became the decision of the House of Lords.

A recent illustration of its application is to be found in the case of *Mayor, &c., of Merchants of the Staple of England* v. *Bank of England* (1), a case so important and germane to the question which I have to decide here that I think it necessary to refer to it at lengh. There the plaintiffs, who were a corporate body, left their seal in the custody of their clerk, one Drew, who without authority affixed it to powers of attorney under which certain stock in the public funds the property of the plaintiffs was sold. The clerk appropriated the proceeds. In an action in which the plaintiffs claimed that they were entitled to the stock, on the ground that it had been transferred without their authority by the defendants, it was held, on the authority of

(1) 21 Q. B. D. 160.

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Bank of Ireland v. *Trustee of Evans's Charities* (1), that, assuming the plaintiffs had been negligent, their negligence was not the proximate cause of the loss, and did not disentitle them from recovering in the action. The case had been tried before Pollock, B., and a jury, who had found, in answer to a question put to them, that the plaintiffs had been guilty of "negligence so as to induce the defendants to act on the powers to transfer." In his judgment Lord Esher, M.R., considers what is to be understood as the meaning of the decision of the House of Lords in the case referred to, and arrives at the conclusion that it was there decided that, in order to excuse the defendants, the negligence of the plaintiffs must be proximately connected with the result. He then proceeds thus (2): "Now, has that view of it, which I think is the fair view of what they intend to say in that case, struck subsequent judges in the same way? It seems to me that it has, and that in *Swan* v. *North British Australian Co.* (3) the judges in the Exchequer Chamber in terms put that meaning on the words which were adopted by the House of Lords. Blackburn, J., said: "What I consider the fallacy of my brother Wilde's judgment [i.e., his judgment in the same case in the Court below] is this: he lays down the rule in general terms 'that if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards against such persons to show that state of facts did not exist.' This is very nearly right, but, in my opinion, not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself and be the proximate cause of the leading the party into that mistake." Byles, J., says: "Assuming that he was chargeable with negligence, still I think the plaintiffs can recover, because the plaintiffs' assumed negligence was not the proximate cause of the transfer by the defendants." Therefore they adopted the view that although there is the neglect calculated to mislead, and although that neglect does mislead, nevertheless it is no answer if it is not the proximate cause of the loss. There are other cases which have been cited

(1) 5 H. L. C. 389.

(2) 21 Q. B. D. 160, at p. 173.

(3) 2 H. & C. 175.

in which the same view is taken of the decision of the House of Lords. When I find that all Courts which have dealt with it since have so understood it I cannot doubt that we ought to say that is the meaning of the House of Lords. Then that reduces us to this, assume that there was negligence by the plaintiffs in this case calculated to deceive the Bank, and that by that negligence the Bank was deceived. Assume all that; still, according to the ruling of the House of Lords, there was no case to go to the jury upon the question whether there was negligence which would excuse the defendants, because that negligence, if it existed, was not the proximate cause of that which the Bank did, namely, transferring the stock. Now, inasmuch as the negligence charged against the plaintiffs is their implicit trust in Drew and intrusting him with the seal, there were several circumstances which existed between that negligence of the plaintiffs and that which the Bank did, namely, transfer the stock, and which prevented that preliminary negligence of the plaintiffs from being the proximate cause of what the Bank did. Therefore I am of opinion that there was no case to be left to the jury on the question, not whether there was negligence, but whether there was such negligence as would have excused the defendants from having transferred the stock without the authority of the plaintiffs." Bowen, L.J., in giving judgment to the same effect, says (1): "Let us assume that the plaintiff corporation here were incautious and careless in the way in which they dealt with their seal under the circumstances. In order that the Bank of England should be excused in the present action it must be shewn, not merely that the plaintiff corporation were careless, but that the carelessness of the corporation directly and proximately led to the loss of the property which the banker was called upon to make good." The learned Lord Justice then proceeds to express his concurrence with the view taken by Lord Esher, M.R., of the House of Lords' case, and continues: "Now here can it be said that the negligence, if it was negligence, of the plaintiff company was the proximate cause of the transfer? Mr. Drew was a person of position and respectability, he was a man who might be trusted, to outward appearances, as much as any man in the country, and

(1) At p. 174.

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even if it were careless for the corporation to leave their seal with him, was it a direct and immediate consequence of that carelessness that he would commit the forgery he committed in the power of attorney, and that the bank would be induced by that to transfer the stock? It seems to me that the proximate cause was the felony and crime of Drew, and that it cannot be said that the felony was itself either the natural, or likely, or necessary, or direct consequence of the carelessness of the plaintiffs." Fry, L.J., agreed with the other members of the Court, holding that if there was any evidence of negligence at all, which he doubted, there was no evidence of negligence so immediately conducive to the transfer that the plaintiffs were estopped from saying the transfer was not their act.

Applying these principles to the present case, the question I have to decide is whether the evidence makes out that species of negligence which, to use Parke, B.'s, language, alone would warrant a jury in finding that the plaintiff was disentitled to complain of the payment of these forged bills, in other words, whether it makes out negligence in or immediately connected with the transactions themselves. Now the transactions consist of a series commencing in February and ending in October, and, in my opinion, no negligence in or immediately connected with them has been made out.

The most important argument presented by the Attorney-General in support of the view that the plaintiff had been guilty of negligence in or immediately connected with them was that which he based on an alleged duty on the part of some one in Vaglianos' office to scrutinize the paid bills as they were returned from time to time by the plaintiff. But in the absence of anything to direct special attention to them, it was not proved that it was any part of the duty of the clerk who checked them with his cash-book to examine the indorsements on the back of the bills at all. It was immaterial, so far as his purpose was concerned, to whom the money was paid, or whether it was paid over the counter or not, or whether it had gone through the hands of one or of a dozen indorsees, and, as I have already stated, I do not think Mr. Disney did enough to put the plaintiff on any special inquiry as to the bills which had been paid prior to the end of

June. If they had been examined it would have been discovered not only that the bills bore no banker's stamp, and therefore had been paid across the counter, but also that the indorsements were not genuine. For it was proved that when the bills were accepted by the plaintiff there was nothing on the back of them. But when they were returned, they bore indorsements earlier in date than the date when the bills were accepted. For example, the first bill, drawn on February 4, three days after sight, and accepted by the plaintiff on the 12th, was then blank on the back; but when returned it bore indorsements purporting to be by C. Petridi & Co., at Constantinople, on February 7, and by B. Maratis on the same day. The same observation applies to all the bills payable after sight, of which there were seven paid prior to the end of June. The gross irregularity of these indorsements must, if they had been looked at, instantly have arrested attention, and have led to Glyka's detection. But nothing had, in my judgment, happened to induce any special scrutiny of them, and so the story which they would have told remained untold. After being checked, for the purposes of verification, by the cashier they were packed up and put away. In the absence of any effective notice being given that there was something abnormal about these bills, I cannot hold that it was a negligent act on the part of the plaintiff not to examine or cause to be examined these indorsements, and, as I have already said, in my opinion no sufficient notice was given to him or his agent that there was anything abnormal about them.

Glyka continued his frauds on the plaintiff throughout the summer, and as the summer advanced grew bolder in his operations. He frequently drew for 2000*l.*—an amount double that of any genuine draft—and on several occasions for still larger sums. He also became somewhat careless as to the form of the letters of advice. The genuine letters invariably bore the date both in old and new styles. The forged letters in six instances bore the new style only. The earliest of these was dated June 9. The others were dated August 5, September 11 and 17, October 2 and 6. The forged letters, moreover, were extremely brief, whereas the genuine letters were generally of some length. But neither the contents of the letters, nor the absence of the "old style" in their

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dates, nor the magnitude of the amounts advised, are, in my opinion, enough to have in themselves attracted the plaintiff's attention or excited his suspicions. I cannot say that omission to notice these peculiarities was evidence of negligence on his part. Glyka, it must be remembered, had his confidence; and although, after the event, these peculiarities in the matter of date, of form, and of amount are striking, I cannot find that the failure of the plaintiff to remark them at the time was a negligent act.

The same considerations apply to another point in the correspondence relied upon by the Attorney-General. Each genuine letter as a rule referred in its first words to the preceding genuine letter as the "last" letter written. In nine instances this reference was wrong, for forged letters had intervened. But to make this circumstance important as any evidence of negligence it must be supposed that the plaintiff could keep in his recollection the dates of the various letters of his correspondence,—a supposition which appears to me to be unreasonable.

The Attorney-General also laid stress on the fact that the forged letters were never acknowledged, while the genuine letters always were. This, again, seems to me to be a circumstance which would not likely to attract attention at the time, having regard to the volume of the plaintiff's business. It must not be supposed that I consider the magnitude of the plaintiff's affairs would excuse the want of reasonable care; but it is a matter which nevertheless has to be considered in coming to a conclusion whether there has in fact been a want of such care.

It remains to notice the criticisms which were made on the part of the defendants on the general conduct of business in the plaintiff's office, and especially in the incidents connected with the checking of Glyka's account in June, 1887. It was urged that there was a total absence of effective supervision over Glyka's proceedings, and that this of itself constituted such negligence as precluded the plaintiff from recovering. And I agree with the Attorney-General that there was a want of proper superintendence over the foreign correspondence in the plaintiff's office. Glyka, a clerk at a very small, indeed an almost insignificant salary, having regard to the important duties intrusted to him,

was left without a check of any kind for months together. Twice a year, it is true, the accounts current which he kept with the correspondents resident in Russia were checked by Mr. Dallow, the bookkeeper, and Mr. Seyler, the indoor manager, Mr. Dallow checking the account current entries with the ledger entries made by himself from the day book and Mr. Seyler calculating the items of interest and commission. But the object of this checking was not to control Glyka, but with a view to the accounts being correctly presented to the foreign correspondents. This want of supervision, however, though in my opinion it was careless, was not in itself the proximate cause of the loss; and according to the authorities to which I have referred was not enough to disentitle the plaintiff from complaining of the payment of the forged bills.

The circumstances connected with checking the account current I must refer to more particularly, as it was strongly contended that the exercise of ordinary care in the inspection of that account would have led to the immediate exposure of Glyka. The account would in the ordinary course be made up and checked at the end of June and of December, but in the year 1887, owing to the change in the firm, which had taken place on May 14, the accounts were directed to be made up to that date instead of to June 30, and in the early part of June Glyka's account with Vucina was accordingly brought under the notice of Mr. Dallow and Mr. Seyler to be checked. The figures and entries subsequent to the conclusion of 1886 were then all in pencil, but it was proved that there was nothing unusual in that. But if the account then exhibited to Messrs. Dallow and Seyler was in the same condition as it now is the attention of any competent person must at once have been called to Glyka's irregularities. This appears clear from an examination of the items on each side. On the debit side it begins with a debit balance forward of 9573*l.* 10*s.* 6*d.*; then follow various debits, and under date of February 4 and 9 and May 5 appear the forged bills for 650*l.*, 700*l.*, 650*l.*, and 1000*l.*, due respectively on February 18, March 7, April 7, and May 12. There is also a debit for commission, the amount of which is arrived at, as Mr. Seyler explained, by deducting from the total amount of the drafts those which had

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been drawn against consignments and some other items, such as cancelled drafts, and charging $2\frac{1}{4}$ per cent. on the difference. Mr. Seyler exercised his own judgment as to what should be deducted. This amount stands at 54*l.* 15*s.* 8*d.* Lastly, there is a debit for stamps. On the credit side are various remittances and proceeds of cargoes credited, and under date of May 14 an item for interest 16*l.* 18*s.* 10*d.* The debit balance forward is stated to be 26,105*l.* 6*s.* 2*d.*, but in the account as it now stands the balance of capital is stated to be 23,060*l.* 18*s.* 4*d.* This is an obvious blunder, inasmuch as the two figures ought to correspond within a few pounds. In the present case, after adding the commission and stamp debit and deducting the interest, 44*l.* 7*s.* 10*d.* would have been the true difference, whereas it is 3044*l.* 7*s.* 10*d.* Mr. Seyler, however, was positive that when the account current was exhibited to him it was not in the same state as it is in now, but that the balance of capital was stated to be 26,060*l.* 18*s.* 4*d.* and not 23,060*l.* 18*s.* 4*d.*; that the figures 33,617*l.* 5*s.* 6*d.* and 21,913*l.* 4*s.* 2*d.* with reference to commission on the debit side were respectively 36,617*l.* 5*s.* 6*d.* and 24,913*l.* 4*s.* 2*d.*; that the commission item was not 54*l.* 15*s.* 8*d.* but 62*l.* 5*s.* 8*d.*; while on the credit side the "interest number" and the interest item were also different, and further that the totals of 46,625*l.* 3*s.* 10*d.* and 26,105*l.* 6*s.* 2*d.* were different also. In other words Mr. Seyler's evidence points to this, that in six or seven particulars the account shewn to him differs from that shewn to me. The account itself shews signs of alterations, and although I cannot detect by inspection all the alterations suggested, it must be recollected that until checked it had been kept in pencil, and its alteration was an easy matter. Glyka himself, who had not heard Mr. Seyler's evidence, corroborated Mr. Seyler's view, and on being recalled to give his version of the matter, explained that he had in fact made the alterations which Seyler said had been made to avoid detection. I may add that he took pains to secure the same object by stating the balance of capital at 26,060*l.* 18*s.* 4*d.* in the copy account current made by him to be kept by the firm, although in that copy there does appear an inconsistency in the debit side, the commission figure being set down as 21,913*l.* 4*s.* 2*d.* instead of 24,913*l.* 4*s.* 2*d.*

With the same view Glyka, who had to transmit to Vucina the true account, excluding the four forged bills, wrote the letter to him in which it was inclosed leaving at first a blank for the amount due from him. He then press-copied the letter, inserting a slip bearing the figures 26,105*l.* 6*s.* 2*d.* over the blank space, so that the press copy letter-book gives those figures. He afterwards filled in the blank space in the letter actually sent with the figures 23,105*l.* 6*s.* 2*d.*, thus effectually deceiving Vucina on the one hand and the plaintiff on the other. To complete the narrative of what passed with reference to this account current it must be noted that Glyka took care to alter Vucina's reply to the letter inclosing his account. Writing on June 10 and 22, Vucina said, "From your former letter we extracted a copy of our account current with you, shewing a balance to our debit of 23,105*l.* 6*s.* 2*d.*" Glyka altered this into 26,105*l.* 6*s.* 2*d.* before he laid the letter before Mr. Vagliano. Upon the whole I do not think any negligence can be imputed to the plaintiff with regard to this account current and the mode in which it was dealt with and checked.

I must not omit to advert to an argument of the Attorney-General based upon the fact that in the pass book of the plaintiff, which was balanced half-yearly, the amount of the forged bills was debited to the plaintiff. That, it was said, was an account stated which could not now be questioned. But at the time the book was balanced the frauds of Glyka had not been discovered; and when the discovery was made I do not see any reason why the items debited should not be questioned.

I have now dealt with all the questions which have been raised in this case; and, as will have been gathered, my conclusion is as follows:—First, the defendants are not protected from liability by s. 7, sub-s. 3 of the Bills of Exchange Act, 1882. C. Petridi and Co. are not, in my opinion, "fictitious or non-existing persons;" and secondly, the plaintiff has not been guilty of that species of negligence which disentitles him to recover in this action. There has been, in my opinion, no negligence on his part in or immediately connected with the transactions themselves. In the result, therefore, my judgment must be for the plaintiff with costs, that he is entitled to be credited by the defendants with

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the amounts of the bills mentioned in the particulars delivered in this action.

Judgment for the plaintiff.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *Freshfields & Williams.*

H. D. W.

[IN THE COURT OF APPEAL.]

Nov. 28.

READ *v.* BROWN.

Mayor's Court—Jurisdiction—Prohibition—"Cause of action arising wholly or in part within the city of London or the liberties thereof"—Assignment of Debt—Mayor's Court Procedure Act (20 & 21 *Vict. c. clvii.*), *s.* 12—*Judicature Act*, 1873, *s.* 25, *sub-s.* 6.

The plaintiff brought an action in the Mayor's Court as assignee of a debt alleged to be due in respect of the price of goods sold and delivered to the defendant by the assignor. The sale and delivery had taken place without the city of London, but the debt had been assigned in writing to the plaintiff pursuant to s. 25, sub-s. 6, of the Judicature Act, 1873, within the city of London:—

Held, that the assignment of the debt was part of the cause of action, and that the cause of action having arisen in part within the city of London there was no ground for a prohibition.

APPEAL from an order made by Sir James Hannen at chambers directing the issue of a writ of prohibition.

The action was commenced in the Mayor's Court by the plaintiff as assignee of a debt of 16*l.* 13*s.* 4*d.*, the price of goods supplied by a firm of Brown & Co. to the defendant. The sale and delivery of the goods appeared to have taken place respectively in Surrey, without the jurisdiction of the Mayor's Court, but it was alleged by the plaintiff that the vendors had executed in writing an absolute assignment of the debt in his favour at 71, Fleet Street, a place within the jurisdiction of the Mayor's Court, and that he had given the defendant express notice in writing of the assignment so executed.

Horace Kent, for the plaintiff. The plaintiff is entitled to sue in the Mayor's Court under s. 12 of the Mayor's Court Procedure

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Act (20 & 21 Vict. c. clvii.). The debt, which is one of less than 50*l.*, was assigned to the plaintiff under s. 25, sub-s. 6, of the Judicature Act, 1873 (1), within the jurisdiction of the Mayor's Court. The assignment is "part" of the "cause of action": *Cooke* v. *Gill.* (2)

Tanner, for the defendant. The prohibition should issue. The vendors cannot themselves sue for the debt in the Mayor's Court as their "cause of action" did not arise "wholly or in part" within the jurisdiction under s. 12 of the Mayor's Court Procedure Act. The effect of the "transfer" of legal rights and remedies contemplated in s. 25, sub-s. 6, of the Judicature Act, 1873, cannot be to enable the assignor to confer upon the assignee a right which the assignor does not himself possess. It is impossible to suppose that the legislature can have intended that the mere fact of the assignment of a debt or chose in action having taken place within the jurisdiction should give the assignee a right of action in the Mayor's Court irrespective of the place in which the claim of the assignor may have arisen.

[He referred to *Jackson* v. *Spittall* (3); *Alderton* v. *Archer* (4); *Lewis* v. *Graham.* (5)]

POLLOCK, B. I am of opinion that this appeal should be allowed. The expressions "cause of action," and "part of the cause of action" have long been judicially defined as meaning respectively the material facts and any material fact in the case for the plaintiff. I need only refer to the judgment of Parke, B., in *Buckley* v. *Hann* (6) and to that of the present Master of

(1) By the Judicature Act, 1873, s. 25, sub-s. 6: "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor."

(2) Law Rep. 8 C. P. 107.

(3) Law Rep. 5 C. P. 542.

(4) 14 Q. B. D. 1.

(5) 20 Q. B. D. 780.

(6) 5 Exch. 43.

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the Rolls in *Cooke* v. *Gill*. (1) Here the fact of the assignment of the debt is a material fact in the case for the plaintiff, and therefore a part of the cause of action. The part of s. 25, sub-s. 6, of the Judicature Act, 1873, which deals with the question is as follows: "Any absolute assignment of any debt shall be and be deemed to have been effectual to pass and transfer the legal right to such debt and all legal and other remedies for the same." The effect of this comprehensive language is in my opinion not merely to place the assignee of a debt in the same specific position as to legal remedies as his assignor, but to enable the assignee of a debt to treat the debt assigned to him as a debt to which as assignee under the statute he has himself personally acquired a legal right enforceable by any legal remedy. Here, the debt assigned having been less than 50*l*., assuming that the assignment, which is a part of the cause of action, has, as alleged, taken place within its jurisdiction the Mayor's Court has jurisdiction to entertain the action, and as s. 25, sub-s. 6, of the Judicature Act, 1873, has conferred upon the plaintiff as assignee of the debt this among other legal remedies, there is no ground for the issue of a writ of prohibition.

MANISTY, J. I am of the same opinion. It has been suggested that inconvenience may result should it be decided that the effect of an assignment of a debt or other chose in action taking place in the city of London or its liberties is to give jurisdiction to the Mayor's Court. I do not see that any untoward consequences need follow; but the Court has to give effect to s. 25, sub-s. 6, of the Judicature Act, 1873, and I think that the assignment being clearly part of the plaintiff's cause of action, and that part of the plaintiff's cause of action having arisen within the jurisdiction of the Mayor's Court, the plaintiff has under this sub-section of the Judicature Act, 1873, a right of action in the Mayor's Court.

H. D. W.

The defendant appealed.

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(1) Law Rep. 8 C. P. 107, at p. 116.

argued as in the Court below, citing in addition *Schroeder* v. *Central Bank of London.* (1)

Horace Kent, for plaintiff, was not called on.

LORD ESHER, M.R. The question which we have to decide is whether any part of the cause of action arose in the City; if it did, then upon the proper construction of the Mayor's Court Act, the Mayor's Court had jurisdiction to try the case. What is the real meaning of the phrase "a cause of action arising in the City?" It has been defined in *Cooke* v. *Gill* (2) to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. It has been suggested to-day in argument that this definition is too broad, but I cannot assent to this, and I think that the definition is right. If that is so, the question arises whether the plaintiff, in order to be entitled to succeed in his action, would not be bound to prove the assignment to him of the debt; not merely whether he would be bound to prove it in an action in the Mayor's Court, but whether he would be bound to prove it in any court in which he might sue, and whether an allegation of the assignment might not have been traversed by the defendant. I cannot bring myself to entertain a doubt that the assignment is a fact which the defendant might traverse; and if that be so, the plaintiff would be bound to prove it.

But I may base my judgment upon stronger ground than this. Sect. 25, sub-s. 6, of the Judicature Act. 1873, gives to the assignee of a debt (I speak of nothing else) more than the mere right to sue for it; it gives him the debt and the legal right to the debt, and it follows from that that he would have a legal right to sue for and recover it, even had the section not contained the words "and all legal and other remedies for the same." A question therefore arises as to the true construction of this section. It is said that it only affects procedure, and nothing more, and in support of this contention a phrase has been cited which occurs at the end of my judgment in *Schroeder*

(1) 24 W. R. 710. (2) Law Rep. 8 C. P. 107.

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v. *Central Bank of London* (1), where I am reported to have said, "I am of opinion that this section gives no new right of action that did not exist before." If what I am there reported to have said could be taken to mean what it is said to mean, it would be a question whether it was not too large, and whether I should be prepared to maintain it; but if my judgment is looked at as a whole, it is clear that it cannot bear the meaning attributed to it, and that it means that s. 25 did not give a right of action which nobody could have had before.

In construing s. 25, sub-s. 6, we must adopt the ordinary rule as to the construction of Acts of Parliament, that of giving, if possible, a meaning to each word. Now the defendant's argument comes to this, that the "legal right" to a debt is the same thing as the "legal and other remedies" for it; but if that is a correct argument, the provision that the assignment shall transfer "the legal right to the debt" is mere tautology, and the section must be read as if the words were not there. That is a wrong rule of construction; the words mean what they say; they transfer the legal right to the debt as well as the legal remedies for its recovery. The debt is transferred to the assignee and becomes as though it had been his from the beginning; it is no longer to be the debt of the assignor at all, who cannot sue for it, the right to sue being taken from him; the assignee becomes the assignee of a legal debt and is not merely an assignee in equity, and the debt being his, he can sue for it, and sue in his own name. We must give that meaning to the language of the sub-section; and, that being so, an assignee in order to shew that the debt is his and that he may sue upon it must prove the assignment; he must, if suing, prove the assignment to himself in order to recover judgment, and the fact of the assignment is therefore part of his cause of action. In the present case part of the cause of action has arisen in the City, and the language of the Mayor's Court Act gives the Mayor's Court jurisdiction. The judgment of the Divisional Court was right and must be affirmed.

FRY, L.J. I am of the same opinion. Everything which, if not proved, gives the defendant an immediate right to judgment,

(1) 24 W. R. 710.

must be part of the cause of action. If the plaintiff in the present case were to fail at the trial to prove the assignment he could not succeed therefore part of his cause of action did arise in the City.

LOPES, L.J. I agree with the definition given by the Master of the Rolls of a cause of action, and that it includes every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action. In the present case the plaintiff could not possibly succeed without proving the assignment; it would be useless for him to prove the mere delivery of the goods. The assignment was therefore part of his cause of action, and that part of the cause of action arose within the City.

I also desire to express my concurrence with what has been said by the Master of the Rolls as to the interpretation of s. 25, sub-s. 6, of the Judicature Act, 1873, and think that under that enactment the assignment passes to the assignee, not only the legal remedies for the debt, but the legal right to the debt itself.

Appeal dismissed.

Solicitor for plaintiffs: *M. White.*
Solicitors for defendant: *Thompson & Ward.*

W. J. B.

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Oct. 27, 31.

WILLIAMS *v.* SMITH AND GREENWOOD.

Defamation—Libel—Privilege—Innuendo—Inference of Defamatory Meaning—Publication in Trade Newspaper of Extracts from Register of County Judgments.

The plaintiff, a hatter, brought an action against the defendants, the proprietors of the *Hatters' Gazette*, a newspaper having a circulation among the members of the trade, for libel. The alleged libel consisted of a statement which appeared in the number of the *Hatters' Gazette* for December 1, 1887, in a column headed "The Gazette," with sub-headings "Bills of Sale," "County Court Judgments" and "The Bankruptcy Acts," under the sub-heading "County Court Judgments," as follows: "W. S., L. House, L. Street (the plaintiff's name and address), 27*l.* 1*s.* 0*d.*, October 13, 1887"; the innuendo being "meaning thereby that on December 1, 1887, there was an unsatisfied judgment against the plaintiff in a county court for 27*l.* 1*s.* 0*d.*, which had been obtained on October 13, 1887." A judgment for that amount had been at that date recovered against the plaintiff in a county court, and had been registered in the register of county court judgments kept pursuant to s. 18 of the County Courts Act, 1852. Prior to December 1, 1887, the plaintiff had satisfied the judgment, but he had not obtained a certificate of satisfaction, and on December 1, 1887, the judgment continued on the register. The defendants had, without themselves searching the register, taken the particulars from another trade newspaper.

The judge held that the words were capable of the alleged defamatory meaning, and left it to the jury to say whether they were libellous. The jury found a verdict for the plaintiff, with substantial damages:—

Held, that the direction and the verdict were right.

Fleming v. *Newton* (1 H. L. C. 263), *McNally* v. *Oldham* (16 C. L. Ir. (N.S.) 298) and *Cosgrave* v. *Trade Auxiliary Co.* (8 Ir. R. C. L. 349) considered.

MOTION on behalf of the defendants to set aside the verdict and judgment for the plaintiff and to enter judgment for the defendants or for a new trial.

The action was brought by the plaintiff, a hatter, carrying on business in the city of London, against the defendants, the proprietors of the *Hatters' Gazette*, a publication subscribed for by and circulating among members of the trade, for libel. The number of the *Hatters' Gazette* for December 1, 1887, contained in a column headed "The Gazette," with divisions headed respectively "Bills of Sale," "County Court Judgments," and "The Bankruptcy Act," with sub-divisions headed "Receiving Orders," "First Meetings and Public Examinations," and "Adjudications;" under the heading "County Court Judgments"

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the following statement: "Williams, Stewart, Leadenhall House, Leadenhall Street (the plaintiff's name and address), hatter, for 27*l.* 1*s.* 0*d.*, October 13." The statement of claim charged the defendants with having "falsely and maliciously" published this statement with reference to the plaintiff, "meaning thereby that there was on December 1, 1887, an unsatisfied judgment against the plaintiff in a county court for 27*l.* 1*s.* 0*d.*, obtained on October 13, 1887, and that the plaintiff was unable to satisfy the said judgment, and was a person unable or unwilling to pay his debts." The defence admitted the publication, and alleged first, that the words did not support the innuendo; secondly, that a judgment for 27*l.* 1*s.* had in fact been recovered against the plaintiff in the Westminster County Court, that such judgment had been registered in the register of county court judgments pursuant to s. 18 of the County Courts Act, 1852 (15 & 16 Vict. c. 54), and continued so registered on December 1, 1887, and that the statement, according to its natural meaning and apart from the innuendo, was, therefore, true; thirdly, that the statement was a transcript of an entry in the register of county court judgments, such register being by law open to public inspection, and was published by the defendants in good faith and without malice in the course of their business as publishers of the *Hatters' Gazette*, and was a fair and accurate report of the proceedings of a Court of Justice, and therefore privileged.

At the trial before Lord Coleridge, C.J., and a jury in Middlesex, it appeared that a judgment against the plaintiff for 24*l.* with 3*l.* 1*s.* costs had been recovered in the Westminster County Court on October 13, 1887. This judgment was in due course registered pursuant to the statute and remained on the register on December 1, 1887. The claim was one for rent brought by the landlord of premises in Limehouse, who alleged that the plaintiff had become tenant by attornment, owing to his having previously paid the rent on behalf of the occupier. The judge decided in favour of the landlord on the point of law. Prior to December 1, 1887, the plaintiff compromised the case, and paid the amount of the claim, the landlord foregoing the costs, but the plaintiff did not give the registrar of the Westminster County Court notice that the judgment had been satisfied.

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The particulars as to the judgment contained in the alleged libel were the same as those on the register. A member of the defendants' firm was called, and stated that the object of the column was to warn the trade against members whose credit was doubtful, and that the statement had been taken by the defendants, without themselves searching the register, from the "Extracts from the register of County Court Judgments" contained in *Stubbs's Weekly Gazette*. It appeared that in this publication the following note was appended to these extracts: "These judgments are not necessarily for debts. In some cases they are for damages or properly disputed causes of action, but no distinction is made on the register. Judgments settled otherwise than through the Court may appear unless satisfaction is entered up within fourteen days allowed for that purpose." The plaintiff had proposed that the defendants should pay him 10*l.* and should insert in the *Hatters' Gazette* a statement that the judgment had been satisfied at the date of the publication, with an apology, but this the defendants declined to do. The Lord Chief Justice held that the words were capable of the defamatory meaning imputed in the innuendo, drew the attention of the jury to the position of the statement in a paper which circulated among members of the plaintiff's trade in a column headed "The Gazette," and among headings relating to bankruptcy and bills of sale, and to the absence of any explanatory statement similar to that in *Stubbs's Weekly Gazette*, and left it to the jury to say whether the statement was libellous. The jury found a verdict for the plaintiff for 25*l.*, and the Lord Chief Justice gave judgment for the plaintiff for that amount.

Winch, Q.C., and *Herbert Reed*, for the defendants. The defendants are entitled to judgment. The words complained of are not capable of the alleged defamatory meaning. According to their natural interpretation they mean no more than that the judgment in question was recovered against the plaintiff at the date named, as in fact it was. The similar statements contained in the column with reference to bills of sale, receiving orders, and adjudications in bankruptcy do not necessarily import that the bills of sale have not been paid off, or that the receiving orders

have not been rescinded, or that the adjudications have not been annulled. The statement also, though actually taken from *Stubbs's Weekly Register*, is in fact a literal extract from the Register of County Court Judgments kept pursuant to s. 18 of the County Courts Act, 1852 (1), and, there being no suggestion of express

(1) By the County Courts Act, 1852 (15 & 16 Vict. c. 54), s. 18, "A registry of every judgment entered in the County Courts for the sum of ten pounds and upwards shall be formed in such manner, and in such place and under such regulations as the Commissioners of Her Majesty's Treasury shall appoint, and for the inspection of the said register when formed such fees shall be charged to persons desirous of inspecting the same as shall be appointed by the said Commissioners, &c."

By the Treasury Instructions of June, 1878, 35, "The registrar shall transmit to the Registry of Judgments a return of all judgments, where the debt and costs amount to £10 and upwards in the Form R. annexed, that are unsatisfied at the expiration of fourteen clear days from the day of hearing or entry of judgment. The certificate of satisfaction shall be according to Form S annexed."

FORM R.

—— Circuit.

Return of judgment given at the County Court of ——, holden at ——, for 10*l.* and upwards, on the —— day of —— 18—.

Name of Defendant.		Residence.		Description.	Amount of judgment.			No. of plaint.
Surname.	Christian name or names.	Name of place, street, &c.	County.		£	*s.*	*d.*	

I hereby certify that the above return is correct.

——, Registrar.

(*Seal of the Court.*)

Certified this —— day of ——, 18—.

FORM S. CERTIFICATE OF SATISFACTION OF JUDGMENT.

—— Circuit.

In the County Court of —— holden at ——.

(*Seal of the Court.*)

I hereby certify that ——, of ——, has satisfied the judgment (Plaint No. —— for £——) recorded against him [*or* her, *or* them] in the Court on the —— day of ——, 18—.

Dated this —— day of ——, 18—.

—— Registrar.

See now the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 183.

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malice in the publication, is privileged. It was so held in the House of Lords in the case of the publication of extracts from the register of protests for non-acceptance and non-payment of bills of exchange and promissory notes which is established by statute in Scotland: *Fleming* v. *Newton.* (1)

R. G. Glenn, (with him, *Cock, Q.C.*), for the plaintiff. The plaintiff is entitled to judgment. The plain meaning of the statement taken with the context is that the judgment was unsatisfied at the date of the publication. It was so held on demurrer, where the pleadings raised the same facts, in the Irish Court of Queen's Bench in *M'Nally* v. *Oldham.* (2)

Winch, Q.C., in reply. *M'Nally* v. *Oldham*, appears to have been doubted in the Irish Courts in the more recent case of *Cosgrave* v. *Trade Auxiliary Co.* (3)

POLLOCK, B. I am of opinion that this motion should be dismissed. I think that both the direction of the Lord Chief Justice and the verdict of the jury were right. I do not think it necessary to say more as to the direction, but proceed to consider whether the verdict can be supported upon the facts proved.

The action is brought by the plaintiff, a hatter carrying on business in the city of London, against the defendants, the proprietors of the *Hatters' Gazette*, a newspaper which has a circulation among the members of the trade, for libel. The alleged libel is the publication by the defendants in the number of the *Hatters' Gazette* for December 1, 1887, of a statement with reference to the plaintiff. This statement appeared in a column headed "The Gazette," and containing as sub-headings "Bills of Sale," "County Court Judgments," and "The Bankruptcy Acts," under the sub-heading "County Court Judgments," and was as follows: "Williams, Stewart (the plaintiff's name), Leadenhall House, Leadenhall Street, hatter, for 27*l.* 1*s.* Oct. 13, 1887." The innuendo in the statement of claim is "meaning thereby that there was on the said date (viz. December 1, 1887) an unsatisfied judgment against the plaintiff in a county court recovered on October 13, 1887."

(1) 1 H. L. C. 363. (2) 16 C. L. Ir. (N.S.) 298.
(3) 8 Ir. R. C. L. 349.

If this statement is to be regarded as a fair report of a judicial proceeding it is privileged according to law. I think the effect of the judgment of Lord Cottenham in the House of Lords in *Fleming* v. *Newton* (1), with which I agree, is to place the publication of a mere extract from a record of judgments kept pursuant to statute on the same footing as a fair report of a judicial inquiry. But this is not a case of the publication of a mere extract from a record of judgments. This newspaper is called the *Hatters' Gazette*, and it is published in order to give information to persons carring on business as hatters as to matters which are of interest to the trade, among others as to the credit of members of the trade. I think that the jury could not have found that such a statement made with reference to a member of the trade in such a column of such a newspaper meant anything else than that the judgment was unsatisfied. The judgment was in fact satisfied when the statement was published, and I think it obviously of great importance that such published statements as this should be really true, and not merely true in the sense that they are accurate reproductions, though that which they reproduce happens to be an extract from a record of judgments. I think, therefore, that the jury was right in finding that the statement conveyed the alleged defamatory meaning.

As to the cases which have been cited, in *Fleming* v. *Newton* (1) the House of Lords reversed a decree of the Scotch Court of Session granting an interdict to prevent the publication of the plaintiff's name in a copy of the register of protests established by law in Scotland, which had been published by the defendants, a society of merchants and traders. I think that Lord Cottenham in his judgment must be taken to have held that the publication was legal. In that case the promissory notes in question had been dishonoured by the plaintiff, and had been protested by the payee, and the protests had been registered according to the law of Scotland, so that the statement published by the defendants of the plaintiff was true. *M'Nally* v. *Oldham* (2), which was argued on demurrer in the Irish Court of Queen's Bench, was substantially the same case as the present. The facts and the innuendo were the same, and the innuendo was, for the purposes

(1) 1 H. L. C. 363. (2) 16 C. L. Ir. (N.S.) 298.

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of the demurrer, to be taken as supported by the statement which had been published. Unlike *Fleming* v. *Newton* (1) it was a case in which the judgment, the particulars of which were published, had in fact been satisfied at the date of the publication. Lefroy, C.J., says, in his judgment: "Availing himself of his legal right, which none of us mean to question, a right to publish a true copy of the judgment, the defendant has added a sting to his report, viz., "that at the date of the publication the plaintiff was a debtor by judgment, and that the debt was unsatisfied." Here the jury had to construe the statement, and as it appeared in a "black list," the object of which is well known, they could not have found that it had any other effect. In the more recent case of *Cosgrave* v. *Trade Auxiliary Co.* (2), in the Irish Court of Queen's Bench, the statement containing the particulars of the judgment was followed by a note to the effect that the judgment was satisfied. The poison and the antidote were administered together. For these reasons I am of opinion that the verdict ought to stand.

MANISTY, J. I have arrived at the same conclusion. The case is important, but it does not, in my opinion, present difficulty. The questions are, whether the statement which has been published by the defendants of the plaintiff is capable, as a matter of law, of the meaning imputed to it in the innuendo, and whether the jury were justified in finding that the statement bore this meaning, and was therefore libellous. The plaintiff is a hatter. The statement complained of was published in the *Hatters' Gazette*, in a column headed "The Gazette," and containing lists of bills of sale, county court judgments, and proceedings in bankruptcy affecting members of the trade, and consisted of the plaintiff's name and place of business, followed by the date and amount of a judgment which had been recovered against him in a county court. This judgment had been registered pursuant to the County Courts Act, 1852, and remained on the register of county court judgments at the date of the publication, but the plaintiff had satisfied the judgment before that date. The meaning imputed to the statement in the innuendo

(1) 1 H. L. C. 363. (2) 8 Ir. R. C. L. 349.

is that the judgment was not satisfied at the date of the publication. The avowed object of the column was to warn the trade against dealing with members whose credit was doubtful, and I think that, apart from authority, a judge might properly hold that the statement was capable of this meaning, and that a jury finding it in a "black list" might reasonably so construe it. The publication of the particulars of a bill of sale in such a column would naturally, I think, imply that at the date of that number of the newspaper the bill of sale had not been paid off.

Three cases were cited. In *Fleming* v. *Newton* (1), in the House of Lords, the publication containing the alleged libel was a simple literal copy of the public register of protests of bills of exchange and promissory notes for non-acceptance or non-payment which is established by statute in Scotland. The statement here complained of, with its context, is in no sense a mere transcript from the register of county court judgments. I agree with my learned brother in his observations on the judgment of Lord Cottenham in *Fleming* v. *Newton.* (1) The case in the Irish Court of Queen's Bench of *M'Nally* v. *Oldham* (2) is, except that it was argued on demurrer, precisely similar to the present case. The nature and circumstances of the publication, the defamatory meaning imputed, and the suggested excuse, were the same as here. The case is an express authority for holding, as the Lord Chief Justice here held, that the statement was capable of supporting the alleged innuendo. As to the more recent case in the Irish Court of Queen's Bench of *Cosgrave* v. *Trade Auxiliary Co.* (3), I desire to say that I do not regard this decision as in any sense overruling *M'Nally* v. *Oldham.* (2) The cases were wholly different. Both related to the publication in "black lists" of the particulars of judgments which were in fact satisfied, but whereas in *M'Nally* v. *Oldham* (2) the alleged libel was interpreted to mean that the judgment was not satisfied, in *Cosgrave* v. *Trade Auxiliary Co.* (3) the particulars were followed by a note to the effect that the judgment was satisfied. The distinction is pointed out by Whiteside, C.J. (4), and

(1) 1 H. L. C. 363.
(2) 16 C. L. Ir. (N.S.) 298.
(3) 8 Ir. R. C. L. 349.
(4) 8 Ir. R. C. L. at p. 355.

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O'Brien, J. (1) I think the direction of the Lord Chief Justice was correct, and that the jury placed upon the statement the only reasonable interpretation. The motion will, therefore, be dismissed.

Motion dismissed.

Solicitor for plaintiff: *A. Haig Brown.*

Solicitors for defendants: *F. A. Foster & Co.*

H. D. W.

Dec. 10.

MURRAY, APPELLANT; THOMPSON, RESPONDENT.

Revenue—Excise—Keeping Dog without Licence—Previous Conviction—Reduction of Fine—7 & 8 Geo. 4, c. 53, s. 78—30 & 31 Vict. c. 5, s. 8— 42 & 43 Vict. c. 49, s. 4.

Where at the hearing of a summons for keeping a dog without a licence it is proved that the defendant has been convicted on a former occasion of a similar offence, but such previous conviction is not stated in the information, the case cannot be treated as the case of a first offence, within the meaning of s. 4 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and therefore the magistrate has no power under that section to reduce the amount of the fine imposed for the offence by 30 & 31 Vict. c. 5, s. 8, and the only power to reduce such fine is that given by 7 & 8 Geo. 4, c. 53, s. 78, under which statute it cannot be reduced to less than one-fourth of the amount.

CASE stated by a metropolitan police magistrate.

Alfred Thompson, the respondent, was summoned for keeping a dog without having in force a licence authorizing him so to do, by reason whereof he had, by virtue of s. 8 of 30 & 31 Vict. c. 5 (2),

(1) 8 Ir. R. C. L. at p. 361.

(2) By 30 & 31 Vict. c. 5, s. 3, an annual duty is imposed of 5*s.* for every dog kept (increased to 7*s.* 6*d.* by 41 & 42 Vict. c. 15, s. 17).

By s. 4: "The said duties and licences shall be excise duties and licences, and shall be under the management of the Commissioners of Inland Revenue; and all the powers, provisions, clauses, regulations, and directions contained in any Act relating to excise duties or licences, or to penalties under Excise Acts, and now or hereafter in force, shall respectively be of full force and effect with respect to the duties hereby granted, and the licences relating thereto, and the penalties hereby imposed, so far as the same are applicable, and shall be observed, applied and enforced for and in the collecting, regulating, and recovering of the duties hereby granted, and the licences relating thereto, and the penalties hereby imposed, and otherwise in relation to the said duties, licences, and penalties, so far as the same shall be consistent with and not superseded by the express provisions of this Act, as fully and effectually as if the same had been herein repeated and specially enacted with reference to

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forfeited the sum of 5*l.* The magistrate heard the case and convicted the respondent, and imposed upon him a fine of 9*s.* 6*d.* The information laid in the case was as follows:—"The information of James Murray, one of her Majesty's officers of Inland Revenue, who prosecutes for her said Majesty in this behalf by order of the Commissioners of Inland Revenue, and states that Alfred Thompson of &c., on the 24th day of March, 1888, at &c., did keep a certain dog without having in force such a licence as in that behalf was and is required by the statutes in that case made and provided, contrary to the form of the said statutes, whereby and by force of the said statutes the said Alfred Thompson has for such offence forfeited the sum of 5*l.*"

It was proved that the respondent had at the time and place mentioned in the information kept a dog, and that the respondent had not at the said time in force any licence authorizing him to keep a dog, and had not since obtained such a licence.

It was further proved that the respondent had been previously convicted for a similar offence, viz. that he had on August 3, 1887, been convicted for the offence of keeping a dog on March 11, 1887, without having in force a licence granted under the Acts in that behalf authorizing him so to do, and had been fined 2*s.* in respect of such offence.

It was contended on behalf of the appellant that the magistrate had no power under the circumstances of the case, under s. 4 of the Summary Jurisdiction Act, 1879 (1), to reduce the amount of

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the last-mentioned duties, licences, and penalties respectively."

By s. 8, any person keeping a dog without a licence "shall for every such offence forfeit the sum of five pounds."

(1) 42 & 43 Vict. c. 49. By s. 4: "Where a court of summary jurisdiction has authority under this Act, or under any other Act, whether past or future, ... to impose a fine for an offence punishable on summary conviction, that Court . . . . in the case of a fine, if it be imposed as in respect of a first offence, may reduce the prescribed amount thereof."

By s. 49: "The expression 'fine' includes any pecuniary penalty or pecuniary forfeiture or pecuniary compensation payable under a conviction."

By s. 53: "The Summary Jurisdiction Acts shall, notwithstanding any special provisions to the contrary contained in any of the statutes relating to Her Majesty's revenue under the control of the Commissioners of Inland Revenue or the Commissioners of Customs, apply to all informations, complaints, and other proceedings before a court of summary jurisdiction under or by virtue of any of the said statutes."

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the prescribed penalty of 5*l.*; and also that he could only mitigate the penalty imposed by s. 8 of 30 & 31 Vict. c. 5 (1), by virtue of 7 & 8 Geo. 4, c. 53, s. 78 (2), and only so as not to reduce the penalty to less than one-fourth of the full penalty. The magistrate held that, inasmuch as the fact of a previous conviction was not set out in the information and summons, he was bound to deal with the case as in respect of a first offence, and therefore had discretion under s. 4 of the Summary Jurisdiction Act, 1879, to reduce the amount of the fine.

The question for the opinion of the Court was whether the magistrate was right in holding as above stated. If the Court should answer this question in the affirmative, judgment to stand, but if in the negative the fine to be increased to 1*l.* 5*s.*

Sir Richard Webster, A.G., (*R. S. Wright*, with him), for the appellant. The magistrate had no power to reduce the fine to less than 1*l.* 5*s.*, one-fourth of 5*l.*, the amount prescribed by the Act imposing the fine. He appears to have been misled by thinking of the practice as to stating a previous conviction in an indictment, but there is no statutory provision requiring the previous conviction to be stated in the information in such a case as the present, and s. 4 of the Summary Jurisdiction Act, 1879, only gives power to mitigate a fine if imposed as in respect of a first offence, and therefore does not apply. The only power to mitigate that can be applicable is that given by 7 & 8 Geo. 4, c. 53, s. 78, by which the amount cannot be reduced to less than one-fourth.

The respondent did not appear.

LORD COLERIDGE, C.J. I am of opinion that the Attorney General is right. On the first occasion the magistrate before whom the respondent was convicted had a general power of mitigation,

(1) Ante, p. 142.

(2) By 7 & 8 Geo. 4, c. 53, s. 78: Except where there is any provision that no mitigation shall be made, justices are authorized and empowered to mitigate any penalty incurred for any offence committed against that or any other Act relating to the revenue of excise, for which any information shall have been exhibited before such justices, as the said justices in their discretion shall think fit, "so as such mitigation shall not reduce such penalty to less than one-fourth part thereof."

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and therefore was justified in imposing the penalty of 2*s.*, but on the second occasion, by the express terms of the statutes which have been referred to, the magistrate only had power to mitigate the penalty so as to reduce it to not less than one-fourth of the amount prescribed. This is so whether the previous conviction is charged in the information or not. If it was proved at the hearing before the magistrate that the respondent had been convicted on a former occasion, the absence of any statement of such previous conviction in the information is immaterial, and the magistrate was bound to treat the fine as imposed as in respect of a second offence.

MANISTY, J., concurred.

Judgment for the appellant.

Solicitor for appellant: *The Solicitor of Inland Revenue.*

P. B. H.

[IN THE COURT OF APPEAL.]

Dec. 18.

BADCOCK AND ANOTHER *v.* HUNT.

Landlord and Tenant—Covenant by Lessor to pay Rates, Taxes, and Impositions —Water-rate.

By a covenant contained in a lease of a warehouse in the city of London the lessor covenanted with the lessees to pay all rates, taxes, and impositions whatsoever, whether parliamentary, parochial, or imposed by the corporation of the city of London or otherwise howsoever, which then were or thereafter might be rated, charged, or assessed on the said premises, or any part thereof, or on the said yearly rent, or on the landlord, owner, or tenants of the said premises in respect thereof.

Water having been supplied to the demised premises for domestic purposes by the New River Company under the provisions of the Waterworks Clauses Act, 1847, the lessees paid the water-rates due in respect of such supply, and sought to recover the same from the lessor:—

Held, that such water-rates were not rates or impositions imposed on or in respect of the premises within the meaning of the covenant, and therefore the lessees were not entitled to recover the same from the lessor.

Spanish Telegraph Co. v. *Shepherd* (13 Q. B. D. 202) discussed.

APPEAL of defendant from the judgment of the Queen's Bench Division (Field and Wills, JJ.), affirming on appeal the judgment of the judge of the City of London Court.

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The facts were as follows:—The action was for breach of a covenant contained in a lease of certain warehouse premises in the city of London. By the covenant the lessor covenanted with the lessees to "bear, pay, and discharge all rates, taxes, and impositions whatsoever, whether parliamentary, parochial, or imposed by the corporation of the city of London or otherwise howsoever, which now are or which hereafter shall or may be rated, charged, or assessed on the said premises, or on any part thereof, or on the said yearly rent, or on the landlord, owner, or tenants of the said premises in respect thereof." Water having been supplied by the New River Company after the lease to part of the demised premises for domestic purposes, the lessees paid the water-rates for the same and sought to recover the amount so paid upon the covenant from the lessor. The New River Company's Act, 1852 (15 & 16 Vict. c. clx.), incorporates the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17). The judge of the City of London Court gave judgment for the plaintiffs, and the Queen's Bench Division, thinking that the case was governed by the decision in *Spanish Telegraph Co.* v. *Shepherd* (1), affirmed his judgment.

Finlay, Q.C., and *C. E. Jones*, for the defendant. The terms of the covenant do not include water-rates. The water-rate under the Waterworks Clauses Act, 1847, though called a rate, is not in truth a rate or charge compulsorily imposed on the premises or in respect thereof such as is contemplated by the covenant, but is merely a payment for the supply of a commodity which the occupier of the premises may take or not as he pleases. The water-rate is, under the 68th section of the Waterworks Clauses Act, 1847, payable by and recoverable from the person requiring, receiving, or using the supply of water, and it is provided by the Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 48, that an incoming tenant shall not be liable to pay arrears of water-rates. It was held in *Sheffield Waterworks Co.* v. *Wilkinson* (2), that the company was not entitled under the Waterworks Clauses Act, 1847, to refuse to supply water to an incoming tenant until arrears due from a former tenant were paid.

(1) 13 Q. B. D. 202. (2) 4 C. P. D. 410.

The "water-rate," as defined by s. 3 of the Waterworks Clauses Act, 1847, includes "any rent, reward, or payment to be made to the undertakers for a supply of water," which shews that the expression is not used in the Act in a strict sense, but only as a comprehensive expression for any payment in respect of a supply of water. The liability is a mere personal liability to pay the price of water supplied, like the liability to pay for any other goods supplied, and cannot be said to be a charge in respect of the premises. The case of *Spanish Telegraph Co.* v. *Shepherd* (1) is distinguishable. The words of the covenant there differed materially from those now in question. There the covenant was to pay "all rates and taxes payable in respect of the demised premises, except for gas consumed by the lessees." The express exception of gas rates was material as shewing in what sense the word "rates" was used in that covenant, and as indicating that it was intended to include water-rates. If that decision is not distinguishable, it is submitted that it cannot be supported, and should be overruled.

Winch, Q.C., and *W. E. Hume Williams*, for the plaintiffs. The water-rate is a rate or imposition imposed upon the tenants in respect of the premises within the meaning of the covenant. There is no reason why the meaning of the covenant should be confined to charges compulsorily imposed on the tenants. No doubt the rate would not be imposed if they did not receive the supply of water, but it is none the less a rate imposed on them in respect of the premises. The manifest scope of a covenant of this kind is that the lump sum paid for rent by the tenant shall cover all such charges as will necessarily arise in connection with the occupation of the premises. Some water supply would be in the contemplation of the parties as being necessary in the case of such premises as these, in order that they might be available for occupation as premises.

Finlay, Q.C., was not called upon to reply.

LORD ESHER, M.R. It may be necessary on a future occasion, but it seems to me unnecessary in this case, to consider whether

(1) 13 Q. B. D. 202.

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Lord Esher, M.R.

the case of *Spanish Telegraph Company* v. *Shepherd* (1) was rightly decided or not. The words of the covenant in that case were different from those of the covenant in the case now before us; and therefore I express no opinion as to that decision. The words here are "all rates, taxes, and impositions whatsoever, whether parliamentary, parochial, or imposed by the corporation of the city of London, or otherwise howsoever." The question appears to me to be whether this water-rate can be said to be a rate or imposition "imposed," within the meaning of those words. I do not think that it can. I do not think that a charge to which a person can only be made liable with his own consent can be said to be imposed upon him within the meaning of this covenant. If a man buys things in a shop, the liability to pay the price may be said in one sense to be imposed upon him by law, but that is not, in my opinion, the sense in which the terms "imposed" and "imposition" are used in this covenant. Furthermore, I think that the words "imposed otherwise howsoever" must be construed according to the rule of construction applicable when general words follow specific words, and that therefore they can only include rates or impositions imposed in a similar manner to parliamentary and parochial rates, viz., imposed compulsorily upon the person charged. For these reasons, I think that the defendant was not bound to pay this water-rate, and therefore that the action is not maintainable, and this appeal should be allowed.

FRY, L.J. I am of the same opinion. It is argued that this charge for water or so-called water-rate is a rate or imposition within the meaning of this covenant. It is a rate in one sense, because it is so called in the statute, but it is in substance a payment for water supplied. The obligation to pay it is one which is voluntarily incurred by the person supplied, because he is not bound to take the water. The water company is compelled to supply if required, but the occupier is not bound to take a supply. Then can this be called a parliamentary rate? I think that the meaning of that term is clear, and that it refers to rates

(1) 13 Q. B. D. 202.

imposed by parliament on persons who have no choice whether they will come under the obligation to pay them, but must pay them whether they will or no. So also with regard to parochial rates, they are rates imposed by the parochial authorities on persons who must pay them whether they will or no. Then is this a rate that comes within the words "imposed otherwise howsoever?" In my judgment it is not imposed at all within the meaning of the covenant; it becomes payable by the voluntary action of the person who chooses to take the water and thereby incurs the legal liability to pay for it; it is not, like the rates and charges previously mentioned in the covenant, an imposition by some superior authority which a man becomes liable to pay whether he will or no.

LOPES, L.J. I am clearly of opinion that this is not a rate or imposition within the words of the covenant, any more than the price of wine or beer which had been supplied to the occupier of the premises would be such a rate or imposition.

Appeal allowed.

Solicitor for plaintiff: *A. Harris.*
Solicitors for defendant: *A. H. Hunt & Co.*

E. L.

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Dec. 11.

TURNER (SURVEYOR OF TAXES), APPELLANT; CUXON, RESPONDENT.

Revenue—Income Tax—Annual Profits or Gains—Profits or Gains arising from Employment or Vocation—Grant by Curates Augmentation Fund—Income Tax Acts, 1842 (5 & 6 *Vict. c.* 35, *s.* 146), *Sched. E., and* 1853 (16 & 17 *Vict. c.* 34, *s.* 2), *Sched. D.*

The council of the Curates Augmentation Fund made a grant of 50*l.* to a curate in recognition of faithful service for more than fifteen years. The grant was renewable at the discretion of the council, and such renewal was upon the condition that the curate obtained donations to the fund to half the amount of the grant:—

Held, that the curate was not assessable to the income tax in respect of the sum granted, either under the Income Tax Act, 1842, Sched. E., or 1853, Sched. D.

CASE stated for the opinion of the Court under 43 & 44 Vict. c. 19, s. 59.

The Rev. G. A. Cuxon, curate of Gislingham, appealed against an assessment of 181*l.* 5*s.* 0*d.*, less the statutory abatement of 120*l.*, in respect of his income as curate, on the ground that the sum of 50*l.* mentioned in such assessment being an allowance from the Curates Augmentation Fund was not assessable to income tax.

The appellant quoted the report of the council of the fund which set forth that the grants were made to curates "of not less than fifteen years standing," not as "eleemosynary pensions, but in recognition of faithful service." He stated that he received what was known as an assisted grant, renewable at the discretion of the committee of the fund, such renewal being made conditional upon the success or failure of his own endeavours to meet such grant by collecting half of its amount in donations (to the fund) from his private friends. The appellant contended that the allowance was in point of fact a donation or gift, and not appurtenant to his office, and was not assessable to income tax.

The surveyor contended that the allowance was a perquisite or profit accruing to the appellant by reason of his office of curate, and was assessable under 16 & 17 Vict. c. 34, s. 2, Sched. D., and 5 & 6 Vict. c. 35, s. 146, Sched. E., r. 1, or as an annual gain or profit under Sched. D. of the latter Act, applicable by virtue of s. 188.

The commissioners decided that the grant was not assessable, and the surveyor applied for a case.

Sir E. Clarke, S.G., and *Dicey*, for the Crown. The respondent is taxable in respect of the 50*l.* under 16 & 17 Vict. c. 34, s. 2, Sched. D., which imposes the tax "for and in respect of the annual profits or gains arising or accruing to any person . . . . from any kind of property whatever . . . and for and in respect of the annual profits or gains arising or accruing to any person . . . from any profession, trade, employment, or vocation," and "for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules." He is also assessable under the words of 5 & 6 Vict. c. 35, s. 146, Sched. E., r. 1, "for persons exercising offices or employment of profit for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices," and under rule 4, defining the perquisites assessable "to be such profits of offices and employments as arise from fees or other emoluments, and payable in the course of executing such offices or employments." The case of *Inland Revenue* v. *Strang* (1) is in point, and shews that this sum of 50*l.* was received by the respondent in respect of his office or employment as a clergyman.

Muir Mackenzie, for the respondent. From the nature of this payment it is clear that it is not within the Acts. It was not a grant in respect of the respondent's office as curate of Gislingham; it was not an "annual" payment, but was renewable each year at discretion, and was only made on certain conditions. It is not an "annual gain or profit," and it does not arise from property, or from a "profession, employment, or vocation," or from an "office." The Scotch case is clearly distinguishable, because there the minister received the payment from his flock as a remuneration for the services which he rendered to them.

LORD COLERIDGE, C.J. The Solicitor-General said, and sincerely I am sure, that no one would prosecute an appeal in a case like this without reluctance. I myself have had to watch my own mind very carefully to prevent my judgment being led away by feelings of sympathy, for it is our duty to decide upon

(1) 15 Scottish Law Rep. 704.

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the real merits of the case. What are the facts? The sum of 50*l.* a year has been granted by the Curates Augmentation Fund to a deserving curate, who, for fifteen years or more, has exercised his vocation without offence, and without scandal. This sum is given partly also in return for efforts made by the curate himself to obtain subscribers to the society to the amount of one-half of that grant, and upon condition that he does obtain subscribers to that amount; it is not given to him as being curate of this parish, but as a donation, *honoris causâ*, for having worked hard during fifteen years without reproach. These are the conditions upon which the gift is made. Now is this sum in the hands of the curate assessable to the income tax? It is, if it is an "annual profit or gain arising from any kind of property," or "from any profession, trade, employment, or vocation"; but it clearly does not so arise; it comes at the mere will of this charitable society; it does not arise from the curate's vocation, and it is not an annual sum. Then is this sum assessable under 5 & 6 Vict. c. 35? It is equally not within the words of Sched. E. of that Act; it does not arise from an office or employment, or by reason of it.

We have been properly pressed with the authority of the Scotch case, *Inland Revenue* v. *Strang.* (1) If that case had been the same as this, I should have felt myself bound to differ from it; but the circumstances are different. There the payment was made to the minister by his parishioners in return for, and as an acknowledgment of, his services in the parish, and might properly be said to arise from his office or vocation. Here that is not so, but the payment is a gift made by a society to a deserving man upon certain conditions; it is a purely voluntary gift, there could be no claim upon the society, and it is not made in respect of the parish of which the respondent is the curate. The appeal must be dismissed with costs.

MANISTY, J. I am of the same opinion, and for the same reasons.

Solicitor for the appellant: *Solicitor of Inland Revenue.*

Solicitor for the respondent: *E. L. Tadman.*

W. A.

(1) 15 Scottish Law Rep. 704.

GOSLINGS & SHARPE, APPELLANTS; BLAKE (SURVEYOR OF TAXES), RESPONDENT. 1888 *Dec.* 10.

Revenue—Income Tax—Banker—Loan for less than a Year—Payment of Interest—Deduction of Income Tax—"Yearly interest of money or any annuity or other annual payment"—16 & 17 *Vict. c.* 34, *s.* 40.

Interest upon a loan by a banker to a customer for a period of less than a year is within the words "any yearly interest of money or any annuity or other annual payment" in 16 & 17 Vict. c. 34, s. 40, and therefore the customer is entitled to deduct income tax from such interest, and if such deduction is made the banker is not liable to pay income tax on such interest.

Bebb v. *Bunny* (1 K. & J. 216) followed.

APPEAL by Messrs. Goslings & Sharpe, bankers, from the decision of the Special Commissioners of Income Tax, by whom the following case was stated for the opinion of the Court:—

At a meeting of the Special Commissioners one of the partners of the firm of Messrs. Goslings & Sharpe attended to appeal against an assessment made upon the firm by the Commissioners under Schedule D. of the Income Tax Acts for the year ending April 5, 1887.

From the profit and loss account of the firm for the three years 1883, 1884, and 1885, as furnished in support of the appeal, their profits were shewn to have been derived from "taxed" and "untaxed" sources, and it was in respect of these "untaxed" profits that returns for the assessment to income tax had regularly been made by the firm, the same having been based upon the average of the balances of profit shewn for the three years immediately preceding the year of assessment.

Since January 1, 1885, the firm had ceased to regard the interest received by them on loans to customers for periods of less than one year as forming a portion of the untaxed profits of the concern, and consequently excluded it from their returns, but had embraced the amounts thereof in the aggregate of their taxed profits in accordance with an arrangement entered into with their customers by which, from that date, the firm had allowed income tax to be deducted from any interest paid to them on loans, whether the same were contracted for periods of less or more than one year.

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The contention of the firm was that in adopting this course they were supported by the decision in the case of *Bebb* v. *Bunny* (1), on reference to which they added, "it was decided that the words 'yearly interest' in s. 40 of 16 & 17 Vict. c. 34 (2), mean not only interest accruing de anno in annum, but any interest at a fixed rate per cent. per annum, though accruing de die in diem."

The Special Commissioners felt themselves unable to adopt and follow this view, having regard to the decision in the case of *Mosse* v. *Salt.* (3)

The appellants expressed dissatisfaction with the decision of the Commissioners as being erroneous in point of law, and duly required the Commissioners to state and sign a case for the opinion of the High Court of Justice, according to the Taxes Management Act, 1880 (43 & 44 Vict. c. 19) s. 59.

Pollard, (*Finlay, Q.C.*, with him), for the appellants. The case turns on 16 & 17 Vict. c. 34, s. 40. The words of that section, "any yearly interest of money, or any annuity or other annual payment," include all interest payable at a fixed yearly rate, and therefore the customers were entitled to deduct income tax from the interest paid by them on loans for periods of less than a year, and the bankers were bound to allow such deduction. The customers are bound to pay to the Crown the income tax so deducted, and it cannot be charged over again as against the bankers.

(1) 1 K. & J. 216.

(2) By 16 & 17 Vict. c. 34, s. 40: "Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled, and is hereby authorized, on making such payment to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable . . . . and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable, and the person to whom such payment as aforesaid is to be made shall allow such deduction upon the receipt of the residue of such money, under pain of forfeiting the sum of fifty pounds for any refusal so to do."

(3) 32 Beav. 269.

That this would be so in cases arising subsequently to the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), is clear from s. 24, sub-s. 3, and that Act has not altered the law as to this point. *Bebb* v. *Bunny* (1) is a conclusive authority in favour of the appellants' contention. The expression of opinion by Sir J. Romilly, M.R., in *Mosse* v. *Salt* (2), on which the Commissioners relied, is only a dictum, and unnecessary for the decision of the case then before the Court.

[He also referred to *Dinning* v. *Henderson* (3), *Foley* v. *Fletcher* (4), and *Clerical, Medical, and General Life Assurance Society* v. *Carter*. (5)]

Sir Richard Webster, A.G., (*Sir Edward Clarke, S.G.*, and *Dicey*, with him), for the respondent. The words "yearly interest of money," coming between "rent" and "annuity or other annual payment," mean interest payable yearly, and are inapplicable to interest on money lent for a period of less than a year. The cases relied on for the appellants are not in point. The correct view as to deduction of income tax is that stated by Sir J. Romilly, M.R., in *Mosse* v. *Salt*. (2)

Pollard, replied.

LORD COLERIDGE, C.J. In this case we have to determine the meaning of the words "any yearly interest of money, or any annuity or other annual payment," in 16 & 17 Vict. c. 34, s. 40. The appellants, who are bankers, make advances to their customers for periods of less than a year, and their view is that where income tax is deducted by the customers from the amount paid for interest upon such advances, they are bound to allow it. They say that the income tax has been paid, or ought to have been paid, by the customer, and the Crown is not entitled to receive the tax twice over, and therefore the bankers can exclude the amount of such interest from the untaxed profits which they return for assessment to the income tax. That is the argument for the appellants. If the point had been open I should have thought that yearly interest of money, or annuity, or other annual

(1) 1 K. & J. 216.
(2) 32 Beav. 269.
(3) 3 De G. & Sm. 702; 19 L. J. (Ch.) 273.
(4) 3 H. & N. 769; 28 L. J. (Ex.) 100.
(5) 21 Q. B. D. 339.

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payment, would be an annual charge, accruing annually. I should have thought it essential that the advance should be for not less than a year. I find, however, that a Court of co-ordinate authority has pronounced a decision to the contrary, and I think it is better that we should adhere to the view adopted by Wood, V.C., in *Bebb* v. *Bunny* (1), where he had the same section and the same argument before him. I base my decision in the present case distinctly and expressly on that of the Vice-Chancellor, and I rely mainly on the following passage in his judgment: "I consider the Act very singularly worded, yearly interest being used apparently in the same sense as annual payments; but I am clearly of opinion that it means at least all interest at a yearly rate, and which may have to be paid de anno in annum; such as interest on purchase-money, as well as mortgage interest; and that, therefore, the purchaser is entitled to deduct the tax in this case." (2) I am quite aware that that case is not exactly the same as this, and that it might be possible to distinguish the actual decision, but the Vice-Chancellor had to interpret the words which are now before us, and, though, with the greatest respect, I do not agree with the view which he adopted, I think it safer to follow his decision, and leave the question to be dealt with, if necessary, by the Court of Appeal. Therefore, solely in deference to the Vice-Chancellor's decision, I give judgment against the Crown. What Sir J. Romilly, M.R., said in *Mosse* v. *Salt* (3) is only a dictum, and the matter was not before him, so his judgment is not an authority for the Crown in the present case, but what Wood, V.C., said in *Bebb* v. *Bunny* (1) was necessary for the decision of the case before him.

MANISTY, J. I have come to the same conclusion, but I wished to find my way out of the decision in *Bebb* v. *Bunny* (1), if it had been possible to do so. The Vice-Chancellor in that case referred to *Dinning* v. *Henderson* (4) which, it is true, is not quite the same as the present case, but is a decision in the same direction. These cases are treated as shewing that interest accruing de die in diem may be deducted in Dowell's Income Tax Laws,

(1) 1 K. & J. 216.
(2) 1 K. & J. at p. 220.
(3) 32 Beav. 269.
(4) 3 De G. & Sm. 702; 19 L. J. (Ch.) 273.

p. 231, 2nd ed., and may have been acted on as authorities for that view. It is safer therefore to follow these decisions, though I should have come to the other conclusion if there had been no authority upon the point.

Judgment for the appellants.

Solicitors for appellants: *Woodrooffe & Burgess.*
Solicitor for respondent: *The Solicitor of Inland Revenue.*

P. B. H.

HUGHES *v.* LLOYD.

Dec. 13, 14, 15.

Ecclesiastical Law—District—New Parish—Burial—"Ecclesiastical Purposes"—Right of Inhabitant of New Parish to bury in the Old Parish—6 & 7 Vict. c. 37, *ss.* 11–15—19 *&* 20 *Vict. c.* 104, *ss.* 11, 14, 15.

The burial of the dead is an "ecclesiastical purpose" within the meaning of 19 & 20 Vict. c. 104, s. 14, and where a district, which has a burial ground, becomes by the operation of this section a separate and distinct parish for ecclesiastical purposes, the inhabitants of such new parish cease to have any right of burial in the burial ground of the old parish out of which the district was taken.

APPEAL from the County Court of Dolgelley.

The action was brought by the rector of the parish of Llanaber to recover 10*s.*, the amount of a burial fee alleged to be due from the defendant.

The old parish of Llanaber was divided, and a new district, called Caerdeon, was constituted under the powers of 59 Geo. 3, c. 134, by an Order in Council on December 31, 1886, and at the same time banns of matrimony, and the solemnization of marriages, baptisms, churchings, and burials were authorized to be published and performed at the church of Caerdeon, and the minister was by such authority entitled for his own benefit to the fees arising from the performance of such offices. In 1887 the new parish of Caerdeon was provided with a consecrated burial ground.

The defendant resided in the new parish of Caerdeon; and his daughter having died on February 22, 1888, he sent on February 23 a notice to the plaintiff of his intention to bury her in the churchyard of Llanaber without the performance of the

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burial service of the Church of England, pursuant to the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 1. The plaintiff then saw the defendant and told him that he had no right to bury in Llanaber, but that he would be permitted to do so on payment of a fee of 10s., which the defendant promised to pay. The burial took place, but the fee was not paid. The county court judge gave judgment for the defendant, and the plaintiff appealed.

Jeune, Q.C., (*Mackarness*, with him), for the plaintiff. The defendant was not a parishioner of Llanaber, and therefore had no right of burial in that parish. By the operation of 6 & 7 Vict. c. 37, and 19 & 20 Vict. c. 104, Caerdeon became a separate and distinct parish for all ecclesiastical purposes, and therefore became separate and distinct in respect of burials: *Cronshaw* v. *Wigan Burial Board.* (1) It has been decided in *Tuckniss* v. *Alexander* (2) and *Fuller* v. *Alford* (3) that marriage is an "ecclesiastical purpose," and so also must be burial in consecrated ground attached to a parish church: *Gough* v. *Jones.* (4)

[He was stopped.]

Brooke Little, for the defendant. The statutes in question do not intend to alter the common law right of a parishioner to bury in the churchyard of the mother parish. If there had been such an intention it would have been indicated by express words. Burial simply, as distinguished from burial with the services of the Church, is not an "ecclesiastical purpose." None of the Acts take away the right of burial simply. There is no compulsory power of obtaining a churchyard for a new parish, and the inhabitants of a new parish might, if the appellant's contention is correct, be without the right to bury in any burial ground. It has been the constant practice to build churches in new districts without any burial ground. Sect. 14 of Lord Blandford's Act (19 & 20 Vict. c. 104), makes no provision with respect to burials. A district is by that section constituted a separate and distinct parish whether there be a licence to bury there or not. It cannot therefore necessarily become a separate

(1) Law Rep. 8 Q. B. 217.
(2) 32 L. J. (Ch.) 794.
(3) 10 Q. B. D. 418.
(4) 9 Jur. (N.S.) 82.

parish for burial. The right of interment is a purely civil and not an ecclesiastical right: *Rex* v. *Taylor*. (1) "Ecclesiastical" means the same as "spiritual" in 58 Geo. 3, c. 45. If the defendant in the present case did promise to pay 10*s*., there was no consideration for such promise, as no service was read by the rector. The only proceeding to recover such a fee is in the Court Christian as a burial fee.

[He cited also *Roberts* v. *Aulton*. (2)]

Jeune, Q.C., in reply. The consideration for the promise was the permission given by the rector, as freeholder of the churchyard, to a non-parishioner to disturb the soil: *Nevill* v. *Bridger* (3); *Ex parte Blackmore* (4); *Gilbert* v. *Buzzard*. (5) The Acts 58 Geo. 3, c. 45 and 59 Geo. 3, c. 134, gave to the new districts the power of obtaining burial grounds, and 7 & 8 Geo. 4, c. 72, s. 2, gave them the right of burying in the burial ground of the old parish until they obtained a burial ground, thus implying that they had no such right before. Though s. 14 of Lord Blandford's Act does not name "burials," yet it introduces s. 15 of 6 & 7 Vict. c. 47, which does name "burials." Burial is an ecclesiastical purpose: Selden on Tithes, p. 204.

[He also cited *Ormerod* v. *Blackburn Burial Board*. (6)]

LORD COLERIDGE, C.J. In this case, which has been well argued on both sides, it is not necessary for us to discuss some of the interesting questions which have been raised. The point which we have to decide is this:—whether, in the case of a parish which has come under the operation of Lord Blandford's Act (19 & 20 Vict. c. 104), and has been made a separate and distinct parish for all ecclesiastical purposes, and has a burial ground of its own, the inhabitants of such a parish have a right of burial in any other parish but that in which they resided. After some hesitation, and after hearing all that could be urged on either side, I have come to a clear conclusion that they have no such right. Lord Blandford's Act must be considered together with the other pre-existing Acts dealing with new parishes. That Act

(1) 1 Burn's Ecc. Law, 258.
(2) 2 H. & N. 432.
(3) Law Rep. 9 Ex. 214.
(4) 1 B. & Ad. 122.
(5) 2 Hagg. p. 364.
(6) 28 L. T. 438.

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came into existence under these circumstances: There were in operation a number of Acts, some old and some recent, which aimed at the division of large and populous parishes into a greater number of separate and distinct parishes for ecclesiastical purposes, and made provisions for the building of new churches, which had become absolutely necessary. Those Acts provided various modes of division, in some cases making absolutely separate and distinct parishes, in others district parishes, and in others chapels with districts annexed, thus often keeping the semblance of a united parish where an old parish was subdivided. That state of things had led to much dispute and ill-feeling, and had caused a considerable amount of injustice, burdens being imposed on new districts for which they received no corresponding benefits. Lord Blandford's Act intended to remedy these matters of complaint. It enacts in effect that when certain conditions precedent, which are stated in ss. 11, 14, 15, have been complied with, a new district which has a church, but may or may not have a churchyard, may, by order in council, be made a separate and distinct parish for all ecclesiastical purposes. That has been done in this case, and, in addition, the inhabitants of this new district have a churchyard of their own and rights of burial therein. The defendant resides in this new separate and distinct parish, and has a right of burial in its churchyard. His daughter died, and he wished to bury her in the churchyard of the old parish, but not being content to pay the burial fee required by the rector, he insists that he had the same right to bury there as he had before the division. He says that no Act has taken away that right which he before possessed, and that for purposes of burial the old parish still remains his parish. I think that he cannot sustain that position. First of all, s. 14 of Lord Blandford's Act says that, "Wheresoever and as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms . . . are authorized to be published and performed in any church or chapel to which a district shall belong . . . such district or place shall become and be a separate and distinct parish for ecclesiastical purposes." Then follows s. 15, which begins by dealing with the rights and privileges of incumbents of new parishes, and then proceeds to say, "that such new

parish shall, for all ecclesiastical purposes, have and possess all and the same rights and privileges, and be affected with such and the same liabilities as are incident or belong to a distinct and separate parish, and to no other liabilities." It is clear, therefore, upon the words of those two sections, that the two parishes in the present case have become separate and distinct parishes for ecclesiastical purposes, the inhabitants of the new parish being parishioners of that parish only, and the new parish having all the rights of a distinct and separate parish.

It has been suggested that burial is not an ecclesiastical purpose. I think that, whatever arguments may be adduced as to the abstract meaning of the expression "ecclesiastical purposes," it is plain, having regard to Lord Blandford's Act and its purview, that burial is an "ecclesiastical purpose" within the meaning of that Act. In cases where there is a burial ground in new parishes, the Act seems clearly to contemplate the inclusion of the right to solemnize burials among the rights given to the incumbent of a new parish. If it be granted that burials could take place in a new district, the words of Lord Blandford's Act must be applied to make such a new district a separate and distinct parish for burials as well as for other things. I found my judgment upon this point upon what I consider to be the true sense and construction of the Act, by which it was intended to make districts having a consecrated church or chapel, in which certain offices of the church are authorized to be performed, separate and distinct parishes for all ecclesiastical purposes, and to include burial as an ecclesiastical purpose.

Mr. Jeune, in his reply, drew our attention to 7 & 8 Geo. 4, c. 72, s. 2, which affords a strong argument in favour of the contention for the appellant. By s. 2: "If there shall not be any burial ground within such district (created under 58 Geo. 3, c. 45), then and in every such case, until a burial ground shall be provided, the bodies of persons dying within such district may be interred in the cemetery of the parish church," and the Act 58 Geo. 3, c. 45, gave to the new districts the power of acquiring burial grounds. This state of things must have been contemplated by the legislature when Lord Blandford's Act was passed. The Act 7 & 8 Geo. 4, c. 72, provides for the case of a new district

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for the time being without a burial ground, and gives it during that time rights in the old parish for an ecclesiastical purpose: the Act 58 Geo. 3, c. 45, provides that as soon as possible a burial ground shall be annexed to a new district, the effect of which would be to make any rights in the burial ground of the old parish cease. That Act, therefore, is very important as shewing the state of facts which was in the contemplation of the legislature in 1856, when Lord Blandford's Act was passed for the purpose of making into separate and distinct parishes districts which were not so before: and s. 15 of Lord Blandford's Act goes on to say that the inhabitants of the new parish shall be parishioners of that parish and of no other.

This new parish in the present case having been made into a separate and distinct parish, have its inhabitants any right of burial in any other parish? They have none, but must buy such a privilege if they desire to have it. I will not enter upon the question as to who is the proper person to give permission for strangers to be buried in a parish churchyard, whether it be the incumbent or the churchwardens, but I will only guard myself against expressing any acquiescence in the cases cited by Mr. Jeune on that point. It is not necessary to decide that point now, for in this case no one but the rector claims the right, and the only possible objection is that by giving the permission the rector infringed upon the rights of others. The contract to pay was made, and no defence on the ground of want of consideration has been established.

MANISTY, J. This case is very simple in itself and might be disposed of by only referring to Lord Blandford's Act and to general principles. I am content, in giving my judgment, to confine myself to the consideration of the Act 6 & 7 Vict. c. 37, and Lord Blandford's Act. When it has once been established that this district is a separate and distinct parish for ecclesiastical purposes under s. 15 of 19 & 20 Vict. c. 104, the question immediately arises as to what rights of burial the inhabitants of such a separate and distinct parish have in another parish. Upon general principles a man has only a right of burial in his own parish unless some Act of Parliament has given him a choice

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of burial in some other parish. Now let us consider the provisions of these two Acts. Referring first to the Act of 1843 (6 & 7 Vict. c. 37), s. 9 recites that "Whereas there are divers parishes, chapelries, and districts of great extent, and containing a large population, wherein the provision for public worship and for pastoral superintendence is insufficient for the spiritual wants of the inhabitants thereof," and provides that separate districts may be constituted for "spiritual purposes." It is to be observed that the reference in that section is to "spiritual purposes" only, and not to such matters as marriages or burials, and that separate districts were constituted for "spiritual purposes" only, and that the rights of the incumbent of the old parish were not interfered with. Great light is thus thrown upon the later portion of that Act, for s. 15 provides that upon the happening of certain conditions such districts shall become new parishes for "ecclesiastical purposes," and the distinction is clearly brought out between "spiritual purposes" and "ecclesiastical purposes." Then ecclesiastical purposes are enumerated, and among them are "burials." Of course if there was no burial ground in such new parish, burials could not take place there; but such a state of things is provided for by 7 & 8 Geo. 4, c. 72, which has been referred to by my Lord.

This case strongly illustrates the rule that, in construing an Act of Parliament, the state of the law and of legislation at the time the Act was passed must be carefully considered. Keeping in mind the then existing state of the law, the effect of Lord Blandford's Act is clearly to convert the new districts into entirely separate and distinct parishes for all ecclesiastical purposes, including burials: the words of ss. 14 and 15 are, in my opinion, clear and conclusive as to that. For the reasons given more at length by my Lord, and for the above reasons, I think that the defendant had no right of burial in the churchyard of Llanaber.

I think that this case might have been disposed of upon a much shorter ground. The defendant did reside in the new district, and upon being told that he had no right of burial in the old parish churchyard, he promised to pay 10*s*. If the right had only been doubtful, yet there was ample considera-

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tion for the promise, when the rector insisted that there was no right.

Appeal allowed; leave to appeal refused.

Solicitors for plaintiff: *Williams & Millard, Dolgelly.*

Solicitors for defendant: *D. Jones & Linnett, for W. R. Davies, Dolgelley.*

W. A.

Nov. 21, 29.

[IN THE COURT OF APPEAL.]

GUARDIANS OF NORTHWICH UNION *v.* GUARDIANS OF ST. PANCRAS UNION.

Poor Law—Derivative Settlement—Settlement of Illegitimate Child—4 & 5 Wm. 4, c. 76, s. 71—39 & 40 Vict. c. 61, s. 35.

Under the Divided Parishes Act (39 & 40 Vict. c. 61), s. 35, an illegitimate child under sixteen, born after the passing of that Act, whose mother has since its birth acquired a derivative settlement, does not take the settlement which its mother had at the time of its birth, but is to be deemed to be settled in the place where it was born.

THIS was an appeal from a decision of the Queen's Bench Division on a special case under 12 & 13 Vict. c. 45, reversing an order of justices for the removal of two infant paupers, Catherine Madden and John Madden, from St. Pancras Union to the Northwich Union.

Catherine Madden was born in Lancashire on October 9, 1876, and John Madden at Birmingham on January 12, 1878. They were the illegitimate children of Catherine Dowling, formerly Madden, who was born at Leftwich, in the Northwich Union, in Cheshire, in 1856, and never acquired a settlement elsewhere in her own right. She married, in February, 1878, John Dowling, who was still living.

On October 21, 1887, two justices for Middlesex, on the application of the guardians of St. Pancras, made an order for the removal of the two children from St. Pancras to Northwich. Upon appeal to the sessions the guardians of St. Pancras abandoned the order as regarded John Madden, he not having in fact become chargeable to the St. Pancras Union, and a case was

stated for the opinion of the Queen's Bench Division, upon which the Court held that the order of removal was invalid.

The guardians of St. Pancras appealed.

1888. Nov. 21. *Bowen Rowlands, Q.C.*, and *Glen*, for the appellants. An illegitimate child retains the mother's settlement, i.e. the settlement which she had when the child was born. The contention of the respondents is that the child follows the settlement of the mother from time to time, and that when she has a derivative settlement the child is remitted to its place of birth. The question turns on the construction of 39 & 40 Vict. c. 61, s. 35. Where the mother's settlement at the time of the child's birth is derivative, the child does not take it: *Reg.* v. *Guardians of Marylebone* (1); but that does not decide the present question, for here the mother's settlement at the time of the birth was not derivative. One of the principal objects of the enactment was, no doubt, to prevent the hardship of town parishes having to maintain children who happened to be born there, and whose parents had other settlements. The Act says that an illegitimate child shall "retain" its mother's settlement. It is proposed by the other side to construe the word as meaning "have and follow," which are the words of 4 & 5 Wm. 4, c. 76, s. 71, the clause which first gave to illegitimate children their mother's settlement, but there is no authority for any such interpretation. The words must be construed "retain the settlement which the mother had at the birth." *St. Andrew's* v. *Bodenham* (2) was under the Act 4 & 5 Wm. 4, c. 76, s. 71, which is repealed in substance by the later Act. It will be urged that such construction tends to separate mother and children; but, having regard to the fact that when a husband dies the widow is restored to her birth settlement (*Guardians of Croydon* v. *Guardians of Reigate* (3)), one construction tends as much to separation as the other. Before the passing of 4 & 5 Wm. 4, c. 76, an illegitimate child had no settlement but at its birthplace. Separation within the age of nurture was prevented, but after that Act separation was prevented up to sixteen. The Act 39 & 40 Vict. c. 61, abolishes

(1) 13 Q. B. D. 15.

(2) 1 E. & B. 465.

(3) 19 Q. B. D. 385.

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derivative settlements, except in the cases specially excepted: *Guardians of Highworth and Swindon Union* v. *Guardians of Westbury-on-Severn Union* (1), and so repeals 4 & 5 Wm. 4, c. 76, s. 71: *Guardians of Dorchester Union* v. *Guardians of Poplar Union.* (2) "Retain," then, cannot mean "have and follow," and the child in this case is properly chargeable to the respondent union.

F. Marshall, for the respondents. The cases of *Overseers of Manchester* v. *Guardians of St. Pancras* (3) and *Reg.* v. *Guardians of Portsea* (4) are against the order of removal. The first clause of s. 35 applies to legitimate children, the second to illegitimate, the third to both. The settlement is to be governed by the circumstances at the time of adjudication: *Guardians of Croydon Union* v. *Guardians of Reigate Union* (5); and a derivative settlement of the mother is not to be taken into account. The child, therefore, by the third part of the clause is remitted to the place of its birth: *The Queen* v. *Guardians of Marylebone.* (6) The cases of *Guardians of Highworth* v. *Guardians of Westbury* (7) and *Guardians of Dorchester Union* v. *Guardians of Poplar Union* (2) are not in point, for they related to legitimate children.

Bowen Rowlands, Q.C., in reply.

1888. Nov. 29. COTTON, L.J. This is an appeal from a Divisional Court of the Queen's Bench quashing an order of justices for the removal of a pauper, Catherine Madden, an illegitimate child, whose mother since its birth has married. The child is now under sixteen—about eleven years of age—and the question is where its settlement is. The justices ordered it to be removed to the birth settlement of the mother, in the Northwich Union.

The question turns on two Acts of Parliament, and principally on the 35th section of the 39 & 40 Vict. c. 61. Before we come to that, we must consider what was the position of an illegitimate child previous to that statute. Up to the 4 & 5 Wm. 4,

(1) 20 Q. B. D. 597–604.
(2) 21 Q. B. D. 88.
(3) 4 Q. B. D. 409.
(4) 7 Q. B. D. 384.
(5) 19 Q. B. D. 385, 388.
(6) 13 Q. B. D. 15.
(7) 20 Q. B. D. 597.

c. 76, the birth settlement was the only settlement of an illegitimate child. The 71st section of that Act enacts that "every child which shall be born a bastard after the passing of this Act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen or shall acquire a settlement in its own right." Now it was held by the Court of Queen's Bench in *St. Andrew's* v. *Bodenham* (1) that the place of settlement of an illegitimate child who had attained sixteen, not having acquired a settlement of its own, was the place of its birth, and that the operation of this section came to an end when the child attained sixteen, but that up to that time it took and followed any settlement which the mother might acquire. That was the law down to the Act 39 & 40 Vict. c. 61. The child in the present case was born after this Act came into operation, and we have to consider what is the real meaning of the 35th section of that Act, which enacts that "no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." There is in this Act no express repeal of the Act 4 & 5 Wm. 4, c. 76, s. 71, but it is said that the section is repealed because the later Act does away with all derivative settlements, and the settlement which a bastard child has under 4 & 5 Wm. 4, c. 76, is a derivative settlement. If the clause had stopped there, that probably would be an unanswerable argument. But it does not stop there. It goes on: "An illegitimate child shall retain the settlement of its mother until such child acquires another settlement." Of course when it is alleged that an enactment is repealed by implication because a clause in a later Act is contrary to and at variance with it, we must look not only to one particular part, but to the whole of the clause which is said to repeal it. The 35th section is awkwardly framed. The enactment in the first part, as to a child under sixteen, can only apply to a legitimate child, for it is to take the settlement "of its

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father or of its widowed mother." Illegitimate children, therefore, do not come within the exception mentioned in the first portion of the section from the general rule, that no person shall derive a settlement from any other person. But when we come to the next part of the clause, we find it assumes that, notwithstanding the previous part of this section, an illegitimate child has somehow or other the settlement of its mother. Now that could only be under 4 & 5 Wm. 4, c. 76, s. 71, because, apart from that Act, an illegitimate child would not take the settlement of its mother, but could only take its birth settlement. Therefore, I come to the conclusion that, on the true construction of this section, apart from the third portion of it, the second part of it does not repeal the 71st section of the Act 4 & 5 Wm. 4, c. 76, but only modifies it so far as to do away with the decision in *St. Andrew's* v. *Bodenham* (1), that when the child attains sixteen its birth settlement will revive, on the ground that the section only operates down to that period. I think, therefore, that the real effect of the first and second parts of s. 35, taken by themselves, is this, that the illegitimate child takes and follows the settlement of its mother until it acquires a fresh settlement of its own. What will be the result if an illegitimate child, not having acquired a settlement of its own, attains the age of sixteen, is a puzzle which we have not to decide in this case, as this child was under sixteen at the time when the question arose.

Then we come to the third part of this section. The mother, as I have already said, had subsequently to the birth of this child, married. She thus acquired a derivative settlement from her husband under the first part of this section. The third part of the section is this: "If any child in this section mentioned shall not have acquired a settlement for itself, or being a female, shall not have not derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiry into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born." Now, though "child" in the first part of the section applies only, as I think, to a legitimate child, yet as illegitimate children are expressly mentioned

(1) 1 E. & B. 465.

in the second, I think that as a matter of construction the words in the third part "any child in this section mentioned" must include not only the legitimate child mentioned in the first part, but the illegitimate child mentioned in the second part. The section, therefore, applies to the child whose case is before us. Now the settlement is to be ascertained at the time when the question of removal comes before the Court, and at the time when this question of removal came before the Court the settlement of the mother was derivative, so that we cannot inquire further into the settlement of the mother, and are compelled by the last part of this section to say that the only place to which this child can be removed must be the place of its birth settlement. Therefore, in my opinion, the order appealed from was right.

LINDLEY, L.J. I have come to the same conclusion. It is not the first time I have had to construe the 35th section of the Divided Parishes Act, but I am bound to say that the more I scan it the less I see my way through it. I do not know how our decision will work, and whether the practical operation of it will not come into conflict with the practical operation of other decisions under the 35th section. It is a puzzling section, but there are certain principles by which we must be guided, and the first thing we have to ascertain is, what has become of the previous enactment in the Poor Laws Amendment Act, 1834 (4 & 5 Wm. 4, c. 76), s. 71. Is that repealed or is it not? and, if it is repealed to any extent, to what extent? There is no express repeal of that section, nor even any express reference to it, though there is an implied reference. The section has been read by Cotton, L.J., and I need not read it again, but it may be convenient that I should refer, for the sake of brevity, to a very clear exposition of the law as it existed before the passing of the Act which we are now interpreting, and which will be found in the judgment of Watkin Williams, J., in the case of *Reg.* v. *Guardians of Marylebone.* (1) He says: "Before the Poor Law Amendment Act, 1834 (4 & 5 Wm. 4, c. 76), s. 71, the liability to relieve illegitimate paupers fell upon their place of birth, which therefore was their place of settlement, with this qualification, that during the

(1) 13 Q. B. D. 15, 20.

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age of nurture such children could not be separated from the mother, and the liability to relieve them fell by accident, as it were, upon the place of the mother's settlement. In this state of the law difficulties arose as to the exact time when the mother and child could be separated and removed to different places. The 71st section of the Poor Laws Amendment Act, in order to settle these difficulties, enacted that, 'Every child which shall be born a bastard after the passing of this Act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen or shall acquire a settlement in its own right.' Upon this section it was decided by Lord Campbell and the Court of Queen's Bench in 1853, in *St. Andrew's* v. *Bodenham* (1), that the place of settlement of an illegitimate pauper over the age of sixteen who had acquired no settlement of his own was the place of his birth and not the settlement of his mother. Then came the present statute, which enacts that 'an illegitimate child shall retain the settlement of its mother until such child acquires another settlement.' It seems to me, therefore, strictly correct to say that an illegitimate child is a child that derives or may derive a settlement from its parent." Now, taking that exposition as our guide, and bearing in mind that the section which we have to construe does not expressly repeal that enactment, we have to read the two enactments together as far as we can, and, when we attempt to do that, we find that a certain portion, and a considerable portion, of the 71st section of 4 & 5 Wm. 4, c. 76, will work with s. 35 of the Divided Parishes Act 39 & 40 Vict. c. 61. The latter Act says: "An illegitimate child shall retain the settlement of its mother until such child acquires another settlement." It does not say how the child is to acquire a settlement, nor anything more than the words I have read, "shall retain." Those words involve its having something to retain. What is there to retain? To ascertain that, we must go back to the old Act, and we find that the child has under the old Act the settlement of its mother, which the later Act says must be retained. So far then as I can see my way the effect of the clause which I have just read is simply to do away with the decision in the case of *St. Andrew's* v. *Bodenham* (1) as

(1) 1 E. & B. 465.

to what happens when the child attains sixteen. The Act 39 & 40 Vict. c. 61, says nothing about the age of sixteen as regards illegitimate children, though it does as regards legitimate children. It seems to me, then, that up to the present stage we have got on sound principles to the conclusion that the clause as to illegitimate children must be read "shall have, follow, and retain the settlement of its mother until such child acquires another settlement." But that does not dispose of the whole case, for we have to consider the 3rd sub-section, which makes obscure that which without it would be tolerably plain. The 3rd sub-section seems to force us to this conclusion—that if the mother has a derivative settlement that derivative settlement cannot be gone into and the child must be taken to be settled in the place of its birth. Whether this result was intended I have not the remotest conception, but it seems to me that we are driven to it and that this appeal altogether fails.

BOWEN, L.J. I am of the same opinion.

The condition of illegitimate children as regards their settlement before the last statute has been correctly set forth by Lord Campbell in the case of *Overseers of St. Andrew's* v. *Bodenham* (1), and by Watkin Williams, J., in the case of *Reg.* v. *Guardians of Marylebone.* (2) Shortly, it was this, that before the statute of 4 & 5 Wm. 4, c. 76, the birthplace of a bastard was the place of its settlement, although the child could not be separated from its mother during the age of nurture. Then came the Act of 4 & 5 Wm. 4, c. 76, which provided that as regards children born bastards after the passing of that Act, every such child should have and follow the settlement of the mother till it attained sixteen or acquired a settlement in its own right. That enactment ceased to apply as soon as the child had attained sixteen, and the settlement of the child was, as it was before the Act of Wm. 4, the birthplace of the child. Then came the enactment which we have to construe, 39 & 40 Vict. c. 61, s. 35, which begins by destroying, to an extent which must be gathered from a careful consideration of its language, derivative settlements. But when we come to the second clause of that section, we find a specific

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provision as to illegitimate children, which stands, so to speak, isolated from the former portion of the section. It is in these words: "An illegitimate child shall retain the settlement of its mother until such child acquires another settlement." That language implies that there is some law in existence in virtue of which the illegitimate child is to take the settlement of its mother. Then, if we ask what law was in existence to that effect we find that it is contained in 4 & 5 Wm. 4, c. 76, s. 71, which therefore is assumed to be alive, so far as regards illegitimate children, at the time when this provision is made, and I think that this second clause of s. 35 is only an amendment and not a repeal of 4 & 5 Wm. 4, c. 76, s. 71, which says that a child which is born a bastard is to have and follow the settlement of its mother till it is sixteen or acquires another settlement. The words "have and follow" may be translated into "have, follow, and retain," because "retain" is involved in "following." Then the later Act, when it says that an illegitimate child is to retain the settlement of its mother until such child acquires another settlement, seems to me to shew that the illegitimate child still has and follows the settlement of its mother for a certain time and up to a certain period, but after the last-mentioned Act the period up to which it is to retain that settlement is changed from an alternative period, viz., sixteen, or the acquisition of a fresh settlement, to a single period, the acquisition of another settlement. Therefore, if the section ended there, the illegitimate child would take and follow, that is to say, take and follow and retain the settlement of its mother till such child acquired another settlement. But then comes the third clause, which modifies again the second clause as regards illegitimate children, because by the comprehensive words, "any child in this section mentioned," the third clause sweeps into its net legitimate as well as illegitimate children, and proceeds to direct that if when you come to make the inquiry you have to consider the derivative settlement of the parent, then to that extent there is modification of the previous part of the section, and you must reject all such inquiry as to the derivative settlement of the parent and relegate the child to the place of its birth. There is nothing to prevent the operation of that clause, and according to its terms

this child is to be deemed settled in the parish in which it was born. That seems to be the view taken in the Court below, and in my opinion this view is right.

Appeal dismissed.

Solicitor for guardians of St. Pancras: *J. Rexworthy.*

Solicitors for guardians of Northwich: *Taylor, Hoare, & Box, for Fletcher, Northwich.*

H. C. J.

[IN THE COURT OF APPEAL.]

Dec. 13.

THE MANCHESTER AND LIVERPOOL DISTRICT BANKING COMPANY, LIMITED *v.* PARKINSON.

Practice—Execution—Receiver, Appointment of—Equitable Execution—Judicature Act, 1873, *s.* 25, *sub-s.* 8.

A judgment having been obtained in an action to recover money due, the judgment debtor died, leaving a will by which she appointed an executor. The judgment debtor at the time of her death was possessed of certain furniture and chattels, and was carrying on a business. The judgment remaining unsatisfied, the judgment creditors obtained an order at chambers appointing a certain person receiver of the furniture and chattels and of the business, and to get in and receive the debts due to such business, and directing him to pay the balance which should appear due on his accounts in or towards satisfaction of the judgment:—

Held, that, in the absence of any legal impediment to obtaining execution of the judgment in the ordinary course of law by fieri facias, or attachment of debts, and there being no special circumstances shewing it to be just or convenient that a receiver should be appointed, the order for appointment of a receiver was wrongly made, and ought to be rescinded.

Whittaker v. *Whittaker* (7 P. D. 15) discussed.

APPEAL from an order of the Queen's Bench Division (Pollock, B., and Manisty, J.) setting aside two orders made by judges at chambers.

The facts were as follows:—The plaintiffs in an action for the balance of a banking account had obtained judgment against the defendant. The defendant subsequently died, leaving a will by which she appointed an executor. The defendant was possessed at the time of her death of certain household furniture and chattels, and carried on the business of an engineer, machinist, coppersmith, and brassfounder.

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The will not having yet been proved, and the judgment remaining unsatisfied, the plaintiffs applied at chambers for and obtained an order appointing a certain person receiver of the household furniture and chattels which belonged to the judgment debtor's estate, situate and being on certain premises, and also of the business of an engineer, machinist, coppersmith, and brassfounder, lately carried on by the judgment debtor, and to collect, get in, and receive the debts due and owing to the said business, and all other the assets, property, or effects becoming payable or transferable thereto, and directing him to pay the balance which should appear due on his accounts in or towards satisfaction of the judgment.

The plaintiffs subsequently applied at chambers for and obtained an order authorizing the receiver to sell the household furniture and chattels, and the assets, property, and effects of the business.

Upon appeal against the before-mentioned orders to the Queen's Bench Division by the executor, who had then proved the will, the appeal was allowed, and the orders set aside.

Cozens-Hardy, Q.C., and *Smyly*, for the plaintiffs, contended that the orders were rightly made by way of equitable execution on the judgment, the Court having jurisdiction under s. 25, sub-s. 8, of the Judicature Act, 1873, to make an order appointing a receiver wherever it might appear to be just or convenient.

[They cited *Whittaker* v. *Whittaker* (1); *Smith* v. *Cowell* (2); Order XLII., r. 23; *Davis* v. *Duke of Marlborough* (3); *Cash* v. *Parker*. (4)]

Byrne, Q.C., and *A. Powell*, for the executor, were not called upon.

LORD ESHER, M.R. In this case an order was made appointing a receiver, and subsequently a further order authorizing a sale. If the first order was wrong, the second falls with it. Therefore the question substantially is whether a receiver ought to have been appointed. The facts were these: There was a judgment

(1) 7 P. D. 15.
(2) 6 Q. B. D. 75.
(3) 1 Sw. 83; 2 Sw. 118, 132.
(4) 12 Ch. D. 293.

recovered at law which created the relation of judgment creditor and judgment debtor. That judgment gave to the judgment creditors the right to ordinary execution at law with regard to effects of the judgment debtor liable to such execution. With respect to the tangible chattels of the debtor, such as the furniture, they would have a right to execution by writ of fi. fa. Then there were alleged to be certain debts due to the judgment debtor. These the judgment creditors would have a right to attach by way of execution. With regard to the business and future profits thereof, they would have no means of touching them. Under these circumstances, was there in this case any ground on which the Court could properly make an order for the appointment of a receiver? It was said that it could be made under the 8th sub-section of s. 25 of the Judicature Act, 1873, which provides that an order may be made for the appointment of a receiver in all cases in which it shall appear to the Court to be just or convenient that such order should be made. It is said that that section gives the Court power to do what neither a Court of Law nor a Court of Equity could have done before the Act; and the case of *Smith* v. *Cowell* (1) seems to shew that to be so, but the condition is that it shall appear to the Court to be just or convenient that the order should be made. Then does it so appear in this case? Take the order first so far as it concerns the furniture. Is it just or convenient that such an order should be made, when there is available a clear and usual mode of realizing the judgment by a writ of fi. fa? I think that, where there is no impediment shewn in the particular case to the realization of the judgment by the ordinary mode of execution at law, it is not shewn to be just or convenient to appoint a receiver and to substitute for the ordinary known practice of execution by fi. fa. another practice, viz., the appointment of a receiver, which to be effectual must be followed by a further order for sale of the goods. Then with regard to the debts due to the judgment debtor's estate; in the absence of any special difficulty in the particular case, the judgment creditors could have recourse to the known practice by way of attachment of the debts. It is not necessary to decide whether the terms of the section might not

(1) 6 Q. B. D. 75.

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be applicable in cases where any special difficulty existed, as for instance if it were impossible to find out what the debts due to the judgment debtor were by reason of concealment on the part of the judgment debtor or some such matter. Here, so far as I see, nothing was brought forward to shew that it would not have been perfectly easy to find out what the debts were and to attach them. Then with regard to the business, it was obviously useless to make the order for a receiver, unless it also made him manager of the business, which was not done by this order. The result is, in my opinion, that there is no part of the order for appointment of a receiver which it has been shewn to have been just or convenient to make. I do not think there would be any authority either at law or in equity to make this order if it could not be done under s. 25 of the Judicature Act, 1873. If the order for a receiver was wrong it follows that the order for sale was equally wrong. With regard to the case of *Whittaker* v. *Whittaker* (1), possibly there were special circumstances, which do not appear from the report, but in the absence of such, I do not think it can be regarded as an authority with regard to the appointment of a receiver.

Therefore, it appears to me that the appeal fails and must be dismissed.

FRY, L.J. I am of the same opinion. It appears to me that neither of these orders can be sustained, either as being made by way of legal or of equitable execution, or as coming within the terms of s. 25 of the Judicature Act, 1873. The first order appoints, in the first place, a receiver of certain furniture and chattels in a particular house. Then it appoints him receiver of the business lately carried on by the judgment debtor. I confess I cannot understand the meaning of that part of the order. Then in the third place it directs the receiver to get in the debts due to the business. So far as it affects the chattels, it is impossible to say that this order amounted to execution at all. Execution means some way of levying the amount of the judgment debt in money. The receiver's holding the chairs and tables would not provide any means of paying the debt. With

(1) 7 P. D. 15.

regard to the part of the order relating to the debts and choses in action, I cannot see what right there was in this case to make such an order. The proper mode of making these available by way of execution was by the process of attachment. Then this order was followed by an order directing the sale of the goods. I have no idea, and it was not explained in argument, by what authority such orders as these could be made. The plaintiffs could have issued execution in the ordinary way by fi. fa. against the goods, but I do not see what authority the Court had to make an order for the appointment of a receiver of them, and then for their sale. It is clear that these orders were not good by way of legal execution. Then is there any pretence for saying that they are good by way of equitable execution? Equity has interposed in various cases to assist execution at law, generally when there was some legal difficulty in the way of enforcing the usual legal remedy. No such case was made out here. The only authority which could be cited for the judgment creditors was the case of *Whittaker* v. *Whittaker* (1), which can hardly be considered an authority on this point, having regard to the fact that the point does not seem to have been argued. Undoubtedly, if any special circumstances had existed shewing it to be just or convenient to make the order for a receiver, the case might have been different, and there might possibly have been jurisdiction to make such an order under s. 25 of the Judicature Act, 1873. But the counsel for the judgment creditors were obliged to admit that they had no materials for arguing that there were any such special circumstances. So that point does not arise. I do not say that there would have been no jurisdiction to appoint a receiver under that section, if there had been special circumstances in the case rendering it just or convenient to make such an order. It may be, for instance, that an order could be made for appointment of a receiver to hold property liable to execution, to prevent some one making away with it, or to get in debts, where under particular circumstances it was a more convenient mode of procuring satisfaction of the judgment than the usual process of attachment. No special circumstances of that sort were shewn in the present case.

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LOPES, L.J. I agree. In this case the plaintiffs obtained judgment, and the judgment debtor was possessed of certain chattels and entitled to certain debts which could have been reached by the ordinary processes of execution. The plaintiffs might have had a writ of fi. fa. for the seizure and sale of the chattels, and they might have attached the debts. There was nothing to prevent their obtaining the fruits of their judgment by ordinary legal process. I do not think that it was the practice of Courts of Equity to appoint a receiver in such cases, unless there was some legal impediment to execution in the ordinary way. It was urged that under s. 25 of the Judicature Act, 1873, an order for a receiver may be made wherever it appears to be just or convenient. I agree that special circumstances may be imagined under which a case might have been made out for the application of that section, but the counsel for the plaintiffs candidly admitted that no such circumstances were made out in this case, and, that being so, I do not think the case is one to which that section is applicable. With regard to the case of *Whittaker* v. *Whittaker* (1), which was referred to as the only case where a Court had made an order similar to this, appointing a receiver of debts under s. 25, it does not appear that the point as to appointment of a receiver was argued, and I do not think that any reliance can be placed on that case as an authority that, in such a case as this, a receiver can be appointed.

Appeal dismissed.

Solicitors for appellant: *Shaw, Tremellen, & Kirkman, for P. & J. Watson.*

Solicitor for respondent: *A. H. Crowther, for S. Woodcock & Co.*

(1) 7 P. D. 15.

E. L.

[IN THE COURT OF APPEAL.]

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Nov. 30.

IN RE SACKER. EX PARTE SACKER.

Bankruptcy—Petitioning Creditor—Receiver appointed in Action in Chancery Division—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6.

In an action in the Chancery Division a receiver was appointed to collect and receive goods comprised in a charge given to the plaintiffs by one of the defendants, including therein any balance of the proceeds of the goods so charged in the hands of the other defendant. An order was subsequently made for the payment by the last-mentioned defendant to the receiver of a specific sum, being money received by him in respect of the proceeds of the goods, and comprised in the charge:—

Held, that the receiver was not a "creditor" entitled to present a bankruptcy petition against such defendant within the meaning of s. 6 of the Bankruptcy Act, 1883.

Ex parte Harris (2 Ch. D. 423) explained and distinguished.

APPEAL against an order of the registrar that W. R. Crozier, who had been appointed receiver in an action, *Boyle* v. *Sacker*, in the Chancery Division, should be at liberty to proceed with a bankruptcy petition presented by him against D. N. Sacker, one of the defendants to the action.

The action was brought by a firm of Boyle, Campbell, Buxton, & Co., against Sacker and a company called the Bulk Petroleum Company. The plaintiffs by their statement of claim alleged that they and the defendant Sacker had carried on a mercantile business on joint account. Part of the business related to petroleum oil, and that part was afterwards transferred to the defendant company. The defendant company had granted to the plaintiffs a charge upon the oil belonging to them, as a security for advances which the plaintiffs had made to them, and, under an agreement between Sacker and the plaintiffs and the defendant company, Sacker had collected in Russia the proceeds of the sale of certain oil, which formed part of the assets of the defendant company. The plaintiffs claimed (inter alia) an account of all dealings between them and Sacker in respect of the business carried on upon joint account, and to have the affairs of that business wound up by the Court; payment by Sacker of the amount which should be found due from him to the plaintiffs; an account of the

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advances made by the plaintiffs to the defendant company; an account of the sums received by Sacker in respect of the assets of the defendant company; and an order that all sums received by Sacker in respect of the assets of the defendant company should be paid to the plaintiffs in discharge, so far as the same would extend, of the advances made by them to the defendant company.

In June, 1888, an order was made by Chitty, J., in the action, appointing W. R. Crozier "to collect, get in, and receive the outstanding assets, property, and effects of the business lately carried on by the plaintiffs and the defendant Sacker." And the Court also thereby appointed Crozier "to collect, get in, and receive the outstanding assets, property, and effects comprised in the charges given to the plaintiffs by the defendant company, including therein any balance of the company's moneys so charged in the hands of Sacker." In August, 1888, Chitty, J., made an order in the action that the defendant Sacker should pay to the receiver two sums of 34,500 roubles and 5000 roubles, belonging to the Bulk Company, which he had received, and which were comprised in the charge to the plaintiffs. These sums were not paid by Sacker, and on October 2, 1888, Crozier filed a bankruptcy petition against Sacker, alleging that Sacker was indebted to him in the sum of 3950*l.*, the equivalent in currency of 39,500 roubles, the amount directed to be paid by Sacker to Crozier under the order of August, as the receiver appointed in the action, and that Sacker had committed an act of bankruptcy.

On the hearing of the petition the preliminary objection was taken on behalf of Sacker, that the receiver was not a good petitioning creditor, and that there was not a good petitioning creditor's debt. The registrar, on the authority of *Ex parte Harris* (1), held that a receiver was a good petitioning creditor, and made the order above stated.

Sacker appealed.

Herbert Reed, for the appellant. The registrar acted entirely on the authority of *Ex parte Harris*. (1) But that case is distin-

(1) 2 Ch. D. 423.

guishable from the present case, because there the receiver was the holder of a bill of exchange in respect of which he could have maintained an action against the debtor in his own name. That was the real ground of the decision in that case. The receiver, under the order made in the present case, is not a creditor of Sacker within the meaning of ss. 5 and 6 (1) of the Bankruptcy Act, 1883, and there is no debt due to him from Sacker. The receiver could not sue Sacker in his own name for the sums which the second order directs Sacker to pay to him; he could only sue him, if at all, in the names of the parties to the action. The receiver is not a trustee for the parties to the action; he is merely an official of the Court who is appointed to collect certain assets, and then to hold them subject to the order of the Court, and a person in such a position cannot maintain a bankruptcy petition against a person who is directed by the Court to pay to him moneys forming part of those assets: *Ex parte Muirhead.* (2)

[He was stopped by the Court.]

Romer, Q.C., Sidney Woolf, and *J. G. Butcher,* for the receiver. The registrar's order is right, though, if necessary, Boyle & Co. might be added as co-petitioners. The two sums which Sacker is ordered to pay to the receiver are not part of the assets of the joint business; they are specifically charged by the Bulk Company in favour of the plaintiffs. When Sacker received those sums he would owe them as a debt to Boyle & Co. A receiver appointed in an action to receive money which is ordered to be paid to him can maintain an action in his own name alone against the person who is ordered to pay the money to him. Even if he cannot maintain a common law action, he can claim in equity: *Hills* v. *Reeves.* (3) In that case the action was in the nature of a common law action of detinue by the receiver in a partnership action to recover title-deeds which formed part

(1) By s. 5 the Court is authorized to make a "receiving order" against a debtor "on a bankruptcy petition being presented either by a creditor or by the debtor."

By s. 6 (1): "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless (inter alia) (b) The debt is a liquidated sum, payable either immediately or at some certain future time."

(2) 2 Ch. D. 22.

(3) 31 W. R. 209.

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of the assets of the partnership. The judgment of Bacon, C.J., in *Ex parte Harris* (1), shews that a receiver is entitled to take proceedings in his own name to get in the assets which he is appointed to receive. And that judgment did not depend merely on the fact that the receiver was the holder of a bill of exchange. In *Ex parte Muirhead* (2) the payment was ordered to be made under the provisions of the Divorce Act, and the decision depended upon that. A receiver stands in the position of a trustee towards the persons who are ultimately entitled to the money which he is appointed to receive. The receiver appointed in an administration action to get in the estate of a testator can prove on behalf of the estate in the bankruptcy of a debtor to the estate: *Armstrong* v. *Armstrong*. (3) A receiver can also in his own name distrain for rent: *Hughes* v. *Hughes*. (4) In *Evelyn* v. *Lewis* (5) a receiver of the rents of real estate of a testator obtained an injunction in his own name for the protection of the property.

LORD ESHER, M.R. If there were any real doubt as to the facts of this case or as to the law I should not be inclined to say that the registrar was wrong in allowing the petition to proceed, because the question, whether of law or of fact, could be raised afterwards. And I am not surprised at the course which the registrar adopted when he was pressed with the case of *Ex parte Harris*. (6) But I think, if he had looked at the judgment in that case, he might have come to the conclusion that the head-note did not accurately represent the effect of the decision. In my opinion the point is perfectly clear, and it would be useless to allow the petition to proceed. The right course, therefore, would have been to dismiss the petition at once.

The question depends entirely on whether the circumstances of this case can be brought within s. 6 of the Bankruptcy Act, 1883—whether there is a good petitioning creditor's debt. That comprises two questions—(1), whether there is such a debt that, if the petitioner were a creditor in respect of it, it would be

(1) 2 Ch. D. at p. 424.
(2) 2 Ch. D. 22.
(3) Law Rep. 12 Eq. 614.
(4) 1 Ves. jun. 161.
(5) 3 Hare, 472.
(6) 2 Ch. D. 423.

a good petitioning creditor's debt; and (2), whether, if the debt would be a good petitioning creditor's debt, the petitioner can be a good petitioning creditor. Sect. 6 assumes that the debt which will support a bankruptcy petition must be a debt of a particular kind—a liquidated sum—owing by the debtor to the petitioning creditor, that is, owing as a debt by the debtor to the petitioning creditor. Is, then, the sum claimed by the petitioner a debt owing to him as a creditor of the appellant? The petitioner is a receiver. He is not a trustee. There is no debt due to him from the appellant. He could not sue for this sum of money in his own name either at law or in equity. Even if he could by the authority of the Court sue for it in his own name, is the money due to him personally either at law or in equity? At law it is certainly not. The debt was due to another person for whom he is not a trustee. The money will not be his when he has got it. Would it be his in equity? I apprehend that he would hold it subject to the authority of the Court, who would deal with it according to the circumstances of the case, but certainly not for his benefit.

It is said that the case is governed by *Ex parte Harris*. (1) The head-note to that case is, "A receiver in Chancery can issue a debtor's summons in respect of a sum due to him in that character." Is that general proposition justified by the judgment? Bacon, C.J., said, "It is the receiver's duty to receive and get in the estate. He gives security for the due discharge of his duty. He is bound to get in all that can be recovered." Those propositions are perfectly right; but no conclusion is drawn from them in the judgment. But the learned judge went on: "He claims too as the holder of a bill of exchange." That made all the difference. If the receiver was the holder of a bill of exchange that would give him a right to sue at law in his own name. That judgment therefore really was that the receiver in that particular case was a good petitioning creditor, because he was the holder of a bill of exchange, and consequently by the law merchant he might have sued on it and recovered the money in his own name, holding the money, when he had got it, as a trustee.

(1) 2 Ch. D. 423.

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Lord Esher, M.R.

Then in *Ex parte Muirhead* (1) it was decided that a person who stood in a position analogous to that of a receiver was not a good petitioning creditor. Why? Because, in the ordinary sense of the term, and within the meaning of the 6th section of the Bankruptcy Act, he was not a "creditor" of the person who had been ordered to pay money to him. A "creditor" in that section does not mean a person who, even if he can recover a sum of money in his own name, is only to recover it as an officer of the Court, for the purpose of enabling the Court to deal with it. Sect, 6 means a "creditor" of a "debtor" in the ordinary sense of the words. In *Ex parte Muirhead* (1) the petitioner was not a "creditor" within the meaning of the Bankruptcy Act, 1869. He was either suing under the practice of the Court of Chancery for the purpose of bringing money into court, or he was suing with the authority of the Court as a mere servant of the Court. That was the ground of that decision, and *Ex parte Harris* (2) is not inconsistent with it. If *Ex parte Harris* (2) did determine what the head-note says it did, I can only say that I do not think it was rightly decided. But I do not think it was decided on that ground.

Hills v. *Reeves* (3) seems to me to have no bearing on the present case.

FRY, L.J. I am clearly of opinion that the petitioner is not a "creditor" of Sacker within the meaning of s. 6 of the Bankruptcy Act. Buxton & Co. have brought an action in the Chancery Division against Sacker and the Bulk Petroleum Company, and in that action they have obtained the appointment of a receiver, first, of the assets of the partnership between the plaintiffs and Sacker, and, secondly, of certain assets charged in favour of the plaintiffs by the defendant company, including any balance of the company's moneys so charged in the hands of Sacker. Subsequently another order was made directing Sacker to pay to the receiver a certain sum of money, part of the balance of the company's moneys so charged which was in his hands. If that be so, it is plain that there is no debt due from Sacker to the receiver.

(1) 2 Ch. D. 22. (2) 2 Ch. D. 423.
(3) 31 W. R. 209.

If Sacker owes that money to any one, it would appear that he owes it to the defendant company. The plaintiffs are only entitled to the benefit of the charge upon it; there is no debt due by Sacker to them. If any debt is due by Sacker to the plaintiffs or to the defendant company, the receiver is only appointed to receive it; there is no vesting in him of any cause of action vested in them. Whatever cause of action they had still remains vested in them. It has been suggested that the receiver could have maintained an action, either at law or in equity, against Sacker to enforce the payment of this sum of money. In my opinion he could not. I cannot conceive how he could frame an action at law. There could be no assumpsit, for there is no legal debt due to him. Nor do I see how he could have proceeded in equity, for there is no equitable debt due from Sacker to him. The only mode that I know of by which the obligation imposed by the order could be enforced against Sacker would be by a proceeding in the Chancery action for contempt, to compel his obedience to the order, and, according to the ordinary practice, such a proceeding would be taken, not by the receiver, but either by the plaintiffs or by the co-defendants, that is, by the person who is interested in the enforcement of the order. There is no debt of any kind due from Sacker to the receiver; consequently he is not a good petitioning creditor, and the petition cannot be maintained. Whether the receiver could prove in respect of this sum in the bankruptcy of Sacker it is not necessary now to consider. As a general rule, a receiver cannot maintain an action to compel obedience to an order for the delivery of goods or the payment of money to him by a party to the action. There may, no doubt, be exceptional cases in which a receiver can bring an action in his own name—when, for instance, he is the holder of a bill of exchange. In that case he can maintain an action, not because he is a receiver, but because he is the holder of the bill. So, too, if he is possessed of chattels as receiver, and those chattels are unlawfully detained from him, he may well be able to maintain an action to recover them as being the person in possession of them, quite independently of the fact that he is a receiver. And there may be other cases in which, having an independent cause of action, the fact that he is

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receiver does not disqualify him from suing. But in such cases he does not sue in his character of receiver.

LOPES, L.J. In my opinion the receiver is not a good petitioning creditor and the alleged debt is not a good petitioning creditor's debt. To constitute a good petitioning creditor's debt the alleged debt must be certainly due and payable to the person who presents the petition. There is no debt due to this receiver. He could not maintain an action of debt for this money in his own name.

Our attention has been called to three cases. The first was *Ex parte Harris* (1), upon the head-note of which the registrar appears to have acted. But I think the judgment does not bear out the head-note. The receiver in that case was not merely a receiver, he was the holder of a bill of exchange, and therefore a creditor, and as the holder of the bill he was entitled to maintain an action upon it in his own name. That I believe to have been the ground of the decision. *Hills* v. *Reeves* (2) was entirely different from the present case. There the receiver was in possession of certain title-deeds as a bailee, and he sued by virtue of the special property which as bailee he had in them. He did not sue as receiver. The judgment in *Ex parte Muirhead* (3) is entirely in accordance with our present decision.

Appeal allowed. (4)

Solicitors for appellant: *Piesse & Son.*
Solicitors for respondent: *Foss & Ledsam.*

(1) 2 Ch. D. 423.
(2) 31 W. R. 209.
(3) 2 Ch. D. 22.
(4) Leave to amend the petition by joining the persons beneficially interested as co-petitioners, was refused.

W. L. C.

[IN THE COURT OF APPEAL.]

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Nov. 23.

IN RE DICKINSON. EX PARTE CHARRINGTON & CO.

Bankruptcy—"Secured Creditor"—Judgment Creditor—Equitable Execution—Order appointing Receiver of Chattels—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 45, 168.

A judgment creditor obtained an order appointing a receiver "to receive the stock-in-trade and other property and effects belonging to" the judgment debtor, without prejudice to certain rights, all further questions being reserved until the further order of the Court. The receiver took possession of the goods under this order, and continued in possession of them until a receiving order in bankruptcy was made against the debtor. No part of the goods had been then sold. The debtor was afterwards adjudicated bankrupt:—

Held (affirming the decision of Cave, J.), first, that the order appointing the receiver did not make the judgment creditor a "secured creditor" of the bankrupt within the meaning of s. 9 of the Bankruptcy Act, 1883; secondly, that, if it did, s. 45 applied, and the execution, not having been completed by sale before the date of the receiving order, could not prevail as against the title of the trustee in the bankruptcy.

APPEAL against an order, made by Cave, J., on the application of the trustee in the bankruptcy of Alfred Dickinson, by which it was declared that a sum of 722*l.* 19*s.* 1*d.*, which was in the hands of the Chief Official Receiver, was the property of the trustee, and the Chief Official Receiver was directed to pay the same to the trustee.

It appeared that the bankrupt was a licensed victualler, who carried on his business at two public-houses called the *Green Dragon* and the *Bedford Hotel*. On December 6, 1887, Messrs. Charrington & Co. recovered judgment against him in an action in the Queen's Bench Division for £2930 1*s.* 5*d.* On December 7 the judgment creditors applied at chambers for an order appointing a receiver of the bankrupt's stock-in-trade and effects, and the Divisional Court to whom the matter was referred made on the 9th an order in the following terms: "It is ordered that G. C. Croft, one of the above-named plaintiffs, be appointed without security until further order to receive the stock-in-trade, utensils and implements of trade, furniture, and other property and effects belonging to the defendant, and unincumbered by any mortgage or other document or process of law, at the *Green*

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Dragon public-house and also at the *Bedford Hotel* public-house, but without prejudice to the rights of any prior incumbrancer or his possession (if any), or to the rights of the landlord of the said premises. And it is ordered that all further questions be reserved until further order." After this order had been made the goods remained in the possession of the receiver (except such parts of them as were sold in the ordinary way of trade in the carrying on of the business) until January 13, 1888, when a receiving order in bankruptcy was made against the bankrupt on his own petition, and he was subsequently adjudicated a bankrupt.

The question then arose whether the trustee in the bankruptcy or the judgment creditors were entitled to the goods.

Nov. 5. *Winslow, Q.C.*, and *Colt*, for the trustee.
Henn Collins, Q.C., and *McCall*, for the judgment creditors.

CAVE, J., held that the judgment creditors had by the order appointing the receiver obtained nothing more than equitable execution against the goods of the debtor; that s. 45 applied to such an execution; and that, the execution not having been completed by sale before the date of the receiving order, the judgment creditors could not retain the benefit of it as against the trustee in the bankruptcy.

The judgment creditors appealed.

Henn Collins, Q.C., and *McCall*, for the judgment creditors. The appellants, by virtue of the order appointing the receiver, became "secured creditors" of Dickinson within the meaning of sub-s. 2 of s. 9 (1) of the Bankruptcy Act, 1883, and they are,

Sect. 9: "(1) On the making of a receiving order an official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court, and on such terms as the Court may impose.

"(2) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he

therefore entitled to the benefit of their security notwithstanding the receiving order in bankruptcy: *Ex parte Rocke* (1); *Ex parte Williams.* (2)

The order appointing the receiver was an equitable execution—an actual "delivery of the goods in execution" to the appellants: *Ex parte Evans* (3); *Anglo-Italian Bank* v. *Davies* (4); *Salt* v. *Cooper* (5). The power given to the High Court by sub-s. 8 of s. 25 of the Judicature Act, 1873, to appoint a receiver, "in all cases in which it shall appear to the Court to be just or convenient" to do so, is a much more extensive power than that which the Court of Chancery possessed before the Act: *In re Pope.* (6)

Sect. 45 of the Act does not apply to such an execution as this, which is not capable of being completed by seizure and sale. The creditors have done all that they can do. There might be hereafter a realization by means of a sale of the goods, but the title of the appellants was complete by the appointment of the receiver.

If the decision of Cave, J., is right, it would not have been necessary to abolish writs of elegit as regards goods by s. 146, and thus to do away with the decision in *Ex parte Abbott* (7).

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would have been entitled to realize or deal with it if this section had not been passed."

Sect. 45: "(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor or of the commission of any available act of bankruptcy by the debtor.

"(2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

Sect. 168: "In this Act unless the context otherwise requires" (inter alia): "'Secured creditor' means a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor."

(1) Law Rep. 6 Ch. 795, 799.
(2) Law Rep. 7 Ch. 314, 317.
(3) 13 Ch. D. 252, 257.
(4) 9 Ch. D. 275.
(5) 16 Ch. D. 544.
(6) 17 Q. B. D. 743, 749.
(7) 15 Ch. D. 447.

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Under the Bankruptcy Act, 1869, a writ of elegit was a casus omissus, and this kind of equitable execution is equally a casus omissus under the Bankruptcy Act, 1883.

[LOPES, L.J., referred to *Mackay* v. *Merritt.* (1)]

Edwards v. *Edwards* (2) shews that the appointment of the receiver took effect from the date of the order.

Winslow, Q.C., and *Colt*, for the trustee, were not heard.

LORD ESHER, M.R. I think the judgment of Cave, J., must be affirmed.

The case has been argued, first, upon the effect of s. 9 of the Bankruptcy Act, 1883. It is admitted that, unless sub-s. 2 of s. 9 applies, the title of the trustee in the bankruptcy to the goods in question must have priority over that of the appellants. It is said that the order of December 9 appointing the receiver made the appellants "secured creditors" within the meaning of sub-s. 2. Now s. 168 says that the expression "secured creditor" in the Act "means" (it does not say "includes") "a person holding a mortgage, charge, or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor." It is not pretended that the order appointing the receiver gave the appellants any mortgage or charge on the property of the debtor, but it is said that by means of the receiver they hold a lien upon the property of the debtor which he received as a security for their debt. How can the possession of a receiver establish a lien in favour of the creditor at whose instance he was appointed? Does the receiver hold the goods so as to give the creditor possession of them? He holds the goods as agent for the Court, not for the creditor. There cannot, therefore, be a possessory lien of the creditor. Is there any other lien? In my opinion the receiver appointed under such an order does not hold the goods for the creditor at all; he holds them for the Court in order that it may decide the right to them. I think the case does not come within sub-s. 2 at all, for the appellants have neither mortgage, charge, nor lien upon any part of the property of the debtor.

But it is argued that the order appointing the receiver is a

(1) 34 W. R. 433. (2) 1 Ch. D. 454.

delivery in execution of the goods to the appellants, and so makes them secured creditors. If it is a delivery of the goods, but it is not to be followed up by any further step in favour of the creditor, how is it an "execution"? It is suggested that the Court might afterwards make an order for the sale of the goods, but it is not said whether it would be an order that the receiver should sell the goods and hand over the proceeds of sale to the creditor, or that the creditor should himself sell the goods, and retain the proceeds. If it were possible that such an order could be made, s. 45 would then apply. If there never can be a realisation of the judgment debt under this order for the appointment of a receiver, how can it be a delivery in execution? If, on the other hand, it is a delivery in execution, it certainly comes within the terms of s. 45, that a creditor who has issued execution against the goods of a debtor shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor, "unless he has completed the execution before the date of the receiving order," that is, by seizure and sale. If, therefore, the order appointing the receiver can be said to be a "seizure" of the goods which might result in a sale, it has not been completed by sale. In my opinion the order is not an execution at all, and, therefore, it is not within sub-s. 2 of s. 9; and, if it is an execution, it is met by s. 45. I prefer, however, to base my judgment distinctly on this, that such an order appointing a receiver of goods does not make the creditor who obtains it a "secured creditor" within the meaning of s. 9.

FRY, L.J. Before the Judicature Act the Court of Chancery exercised a jurisdiction in aid of judgments at law, and that jurisdiction was most frequently exercised in the case of a writ of elegit against land by the appointment of a receiver of the rents and profits of the land, which, when he had received them, were paid into court by the receiver, and in course of time were paid out to the judgment creditor in satisfaction pro tanto of his judgment. In this way he obtained payment of the money to which he was entitled under his judgment. There were, no doubt, some other cases in which the Court of Chancery would assist a creditor who had issued a fi. fa. against goods under a

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judgment at law. This was the extent of the jurisdiction of the Court of Chancery in aid of a judgment at law before the Judicature Act. That Act, by s. 25, sub-s. 8, enabled the High Court to appoint a receiver "in all cases in which it shall appear to the Court just or convenient that such order should be made," and it is under the jurisdiction thus conferred that the order now in question has been made. The order does not authorize the receiver to receive any money. It empowers him to take possession of and to hold certain chattels and effects belonging to the judgment debtor, and, in my opinion, that is all which he can do under the order. Whether any further order can be made authorizing him to do anything else I really do not know.

This being the position of things, the question which we have to decide is, whether, by virtue of the order, the judgment creditor is a "secured creditor" within the meaning of s. 9 of the Bankruptcy Act. By virtue of sub-s. 1 the obvious effect of a receiving order in bankruptcy is (but for the saving clause in sub-s. 2) to put an end to any right which the creditor may have obtained by means of the order appointing the receiver. But then comes the proviso contained in sub-s. 2, which must be read in connection with the definition of the term "secured creditor" contained in s. 168. If the appellants be "secured creditors" I have not the slightest idea how they could realise their security under the order which appointed the receiver. But, in my judgment, they are not secured creditors at all. It is admitted that they do not hold any "mortgage" on the property of the debtor. How does the order create any "charge" on the property? It only directs the person mentioned in it to receive the specified property without prejudice to certain rights, all further questions being reserved until the further order of the Court. It is equally plain to me that the order creates no lien on the debtor's property in favour of the receiver, and it certainly creates none in favour of the judgment creditors, who have no possession of the property.

But s. 45 has also a very material bearing on the question. It provides that a creditor who has issued execution against the goods of a debtor shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor,

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unless he has completed the execution by seizure and sale before the date of the receiving order. I do not understand how the order which appointed the receiver could ever be an execution at all, for no money would ever be received by the judgment creditors by virtue of it. But, if the order amounted to execution against the goods of the debtor, then it was not completed before the date of the receiving order. The appellants are in this dilemma—either they have issued execution against the debtor's goods or they have not. If they have not, their argument fails entirely; if they have, the execution was not completed before the date of the receiving order, and they cannot, therefore, retain the benefit of the execution as against the trustee in the bankruptcy.

LOPES, L.J. I am of the same opinion, and I have nothing to add.

Appeal dismissed.

Solicitors for the judgment creditors: *Loxley & Morley.*
Solicitors for trustee: *Nash, Field & Withers.*

W. L. C.

[IN THE COURT OF APPEAL.]

Dec. 7.

IN RE DAVIS & CO. EX PARTE RAWLINGS.

Bill of Sale—Bankruptcy—"License to take possession of personal chattels as security for a debt"—Assignment of Rights under Agreement for Hire and Purchase of Furniture—Assignment of Future Payments—Validity as against Trustee in Bankruptcy of Assignor.

An agreement for the hire, and ultimate purchase by the hirer, of specified articles of furniture, provided that, on payment by the hirer of an agreed price, which was to be paid in a fixed number of periodical instalments, the articles should become his property, but that, until the agreed price had been fully paid, they should remain the property of the lender. It was further provided that, if default should be made in the punctual payment of the hire, the lender might immediately enter upon the dwelling-house of the hirer and take possession of, and remove and sell the goods.

During the currency of this agreement the lender assigned all his right and interest under the agreement to a person who had lent him money, as security for the advance, authorizing him, if default should be made in repayment of the

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loan as agreed, to exercise all the powers contained in the hiring agreement, until the balance due to him should have been repaid:—

Held, that this assignment was not a "bill of sale" within the meaning of s. 4 of the Bills of Sale Act, 1878:

Held also, that the licence to enter and take possession of the goods was not capable of being assigned.

Brown v. *Metropolitan Counties Life Assurance Society* (28 L.J. (Q. B.) 236) followed.

Held also, that the assignment of the instalments which accrued due under the hiring agreement after the commencement of the bankruptcy of the assignor was valid as against the trustee in the bankruptcy.

Ex parte Nichols (22 Ch. D. 782) distinguished.

APPEAL by the trustee in the bankruptcy of J. & H. Davis (trading as Davis & Co.) against the refusal by Cave, J., of an application by the trustee for a declaration that he was entitled to the benefit of certain agreements for the hire and purchase of furniture, which had been entered into by the bankrupts, who were dealers in furniture.

In March, 1886, by a deed made between the bankrupts and E. Fuchsbalg, after a recital that Fuchsbalg had agreed to lend the bankrupts 1000*l.* upon the security of certain hiring agreements, in consideration of 140*l.* by way of bonus, and that the 1140*l.* was to be repaid by monthly instalments of 47*l.* 10*s.* until the whole 1140*l.* was paid, the bankrupts assigned to Fuchsbalg "all their right or interest in the aforesaid hire agreements as set out in the schedule annexed thereunto." Provided, that, so long as they should faithfully pay the aforesaid instalments at the time specified, then Fuchsbalg should not exercise any of the powers conferred by the said agreements upon the bankrupts, or by virtue of the deed of assignment upon him, but, should default be made in payment of any of the instalments at the time specified, Fuchsbalg should be at liberty to exercise all the powers contained in the aforesaid agreements until the whole balance then due to him, together with the costs, &c., had been repaid him, and for that purpose the bankrupts did thereby consent and authorize Fuchsbalg to use their names for all purposes in connection with the said agreements, and nominated, constituted, and appointed him their attorney for the purposes aforesaid, but not otherwise. The schedule to the deed contained the particulars of a number of hire agreements which had been entered

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into between the bankrupts and various persons whose names were given, for the purchase of furniture at a price to be paid by means of weekly, monthly, or quarterly instalments. These agreements were all made in the same form. One of them (which may be taken as a specimen) was dated September 15, 1884, and was made between the bankrupts (called the lenders), and a Mrs. Harris (called the hirer), and by it the lenders agreed to let to the hirer, who agreed to take on hire for use in her dwelling-house, the several articles specified in an annexed inventory, which were of the agreed value of 74*l.* 18*s.* The hirer was to pay to the lenders the sum of 8*l.* per quarter for the hire of the said goods until the full sum of 74*l.* 18*s.* should be paid. (4.) "If default be made in the punctual payment of the hire, the lenders may, immediately after such default, take possession of and remove and sell the said goods, and for that purpose may enter and remain upon the said dwelling-house, or may sell the said goods by auction on the said dwelling-house. If admission to the said dwelling-house cannot be obtained in the usual manner, the lenders and their agents may break open the outer and inner doors and the windows, for the purpose of obtaining admission. (5.) When the sum of 74*l.* 18*s.* shall have been paid by the hirer, the said goods shall become her property; but, until the said amount shall have been fully paid, they shall remain the property of the lenders."

In May, 1887, Fuchsbalg gave notice of the assignment of March, 1886, to each of the hirers of furniture under the hiring agreements mentioned in the schedule to that assignment.

In May, 1887, a receiving order was made against J. & H. Davis on their own petition filed on May 19, and they were afterwards adjudicated bankrupts.

At the date of the receiving order there remained due to Fuchsbalg on the security of the assignment to him about 600*l.*, and he subsequently received from the hirers payments which became due under the hiring agreements. The trustee in the bankruptcy, having applied to Cave, J., sitting in bankruptcy, for a declaration that he as trustee was entitled to the benefit of the agreements set forth in the schedule to the assignment above mentioned, and of all moneys paid, due, or growing due there-

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under and received by Fuchsbalg, Cave, J., on November 13, 1888, following his own decision on the same day in *In re Davis & Co., Pipe's Case* (1), dismissed the application, on the ground that the deed of March, 1886, was a valid assignment of choses in action.

The trustee appealed.

Cooper Willis, Q.C., and *Rose Innes*, for the appellant. First, the assignment to Fuchsbalg of the benefit of the hiring agreements was a "bill of sale" within the meaning of the Bills of Sale Acts, and is void for non-compliance with the provisions of the Acts. The definition of the expression "bill of sale" in s. 4 of the Bills of Sale Act, 1878, includes "powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreements, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." The hiring agreements empower the lenders of the furniture in certain events to seize the articles which are hired in the house of the hirer, and to remove them, and the benefit of that licence to seize is assigned to Fuchsbalg, and he is authorized to use the name of the bankrupts in connection with the agreements. There is a licence to Fuchsbalg to do whatever the bankrupts could do under the agreements. The power of attorney makes Fuchsbalg the agent of the bankrupts.

[FRY, L.J. I doubt whether it is an assignable licence: *Brown* v. *Metropolitan Counties Life Assurance Society*. (2)]

Under the hiring agreements the goods remain the property of the lenders until all the instalments of the agreed purchase-money have been paid. The property in the goods is capable of assignment, and with it the licence to seize. The licence is not a bare licence to seize, it is accompanied by the property in the goods. A licence to seize a man's own goods can be assigned with the goods.

Secondly, the assignment of the instalments of the purchase-money which accrued due after the commencement of the bank-

(1) W. N. 1888, p. 225. (2) 28 L. J. (Q.B.) 236.

ruptcy is void as against the trustee. The right to receive those instalments is vested in the person who has the property in the goods, i.e., the trustee in the bankruptcy: *Ex parte Nichols.* (1)

Sidney Woolf, for Fuchsbalg, was not heard.

LORD ESHER, M.R. The first question is, whether the assignment to Fuchsbalg is a "bill of sale." It is clear that it is not in the ordinary sense of the words; it sells nothing. It is said that it comes within the definition of the term "bill of sale" contained in s. 4 of the Bills of Sale Act, 1878. It is nothing more than an assignment of the benefit of a contract, and I can see nothing in s. 4 which says that such an assignment is a "bill of sale." All that the instrument does is to assign the right of the lenders to sue under the hiring agreements. I can see no words which assign the property in the goods. The hiring agreements do not confer on the lenders any property in the goods; the property in the goods was theirs before the hiring agreements were made. The property in the goods does not pass by the hiring agreements to the hirer until all the instalments of the price have been paid. It is said that the assignment passes to Fuchsbalg the right which the hirers reserved to themselves, in case of default being made in payment of the instalments, to enter into the hirer's house and seize the furniture. But *Brown* v. *Metropolitan Counties Life Assurance Society* (2) shews that such a personal licence as this cannot be assigned. The assignment, therefore, is not a "bill of sale" within the meaning of the Act.

But it has been argued that, even though the assignment is not a "bill of sale," the instalments which accrued due after the commencement of the bankruptcy never became due to any one but the trustee in the bankruptcy, and could not be assigned by the bankrupts so as to defeat the title of the trustee, and *Ex parte Nichols* (1) was cited in support of this proposition. But what is the true interpretation of these hiring agreements? They are agreements for the sale of certain goods by the lenders to the hirer for a specified price, which is to be paid in a number of instalments at given periods, and power is given to the lenders or

(1) 22 Ch. D. 782. (2) 28 L. J. (Q.B.) 236.

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sellers to enter into the house of the hirer or purchaser upon default in payment of the instalments. But the property in the goods did not pass to the lenders by virtue of the agreements. At the commencement of the bankruptcy there was, therefore, existing an assignment by the bankrupts of certain payments which were to become due to them at certain fixed periods. These payments are by the assignment charged in favour of Fuchsbalg, and he has a right to receive them. It is an entirely different case from *Ex parte Nichols.* (1) In that case the bankrupts were lessees of the Alexandra Palace, and had agreed with the Great Northern Railway Company that that company should receive a gross sum for the carriage of passengers to the Palace and their admission into it, and should pay to the bankrupts a certain proportion of the gross sums received by them. Then the bankrupts assigned, by way of security for an advance made to them, all the sums of money then due and owing, and thereafter to become due and owing, from the railway company to them. And the Court held that, as regarded payments which became due from the railway company under the agreement after the commencement of the bankruptcy, the assignment was void as against the trustee who had carried on the business of the bankrupts. The assignment was of the future profits of the business of the bankrupts. The payments accruing after the bankruptcy could not arise by reason of anything existing at the date of the bankruptcy. They would only arise in case the business of the bankrupts should be carried on, and in case, by reason of its being carried on, payments should be made to the person who was carrying it on. If the business was being carried on by the trustee the payments would never become due to the bankrupts, they would become due to the trustee.

FRY, L.J. The assignment to Fuchsbalg is plainly not a "bill of sale" within the ordinary meaning of those words. It has been argued that it is a "bill of sale" within the meaning of s. 4 of the Act, because it is a "license to take possession of personal chattels as security for a debt." In my judgment, the

(1) 22 Ch. D. 782.

instrument is not such a licence. If anything, it is an assignment of a licence to take possession of goods, and in *Brown* v. *Metropolitan Counties Life Assurance Society* (1), it was held that a bare licence to seize chattels could not legally be assigned. The instrument is not, therefore, a "bill of sale" within the meaning of s. 4. But it is said that the licence to seize the goods is assigned together with the goods themselves. In my judgment, the terms of the assignment do not include the chattels themselves. The assignment is of the rights of the assignors under the hiring agreements, and the property in the chattels did not pass to them under the hiring agreements. The instrument is not, therefore, a bill of sale.

Then it is said that the payments which became due from the hirers under the hiring agreements after the bankruptcy were not capable of being validly assigned as against the trustee, on the authority of *Ex parte Nicholls.* (2) But that case has no bearing on the present, for that which was assigned in the present case was a debt due at the date of the assignment, though it was not payable until a future time. In *Ex parte Nicholls* (2) nothing was due to the bankrupts at the date of the assignment, but they attempted to assign a debt which might become due to the trustee in their bankruptcy at a future time. They had nothing to assign.

LOPES, L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for trustee: *Lewis & Churchman.*
Solicitor for respondent: *Vandamm.*

W. L. C.

(1) 28 L. J. (Q.B.) 236. (2) 22 Ch. D. 782.

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HARTLEY *v.* HALSE.

Parliament—Registration—Borough Vote—County Council—Notice of Objection—Power of Amendment—County Electors Act, 1888 (51 *Vict. c.* 10), *s.* 4, *sub-s.* 1; *s.* 13—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 15, *sub-s.* 2; *s.* 28, *sub-s.* 2—*Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18, *Schedule III., Form I., No.* 2.

By Form I., No. 2, in Schedule III. to s. 18 of the Registration Act, 1885, where a list of voters is made out in divisions the notice of objection to be given to the person objected to shall specify the division to which the objection refers.

The occupiers' list of voters for a borough was made out in divisions, and the name of a person intended to be objected to was in Division One, which consisted of persons entitled to be registered both as parliamentary voters and as county electors. The notice of objection was as follows: "I hereby give you notice that I object to your name being retained on the occupiers' list of parliamentary voters for the borough of ———, and as a county elector for the county of ———":—

Held, that assuming the notice to be invalid, the defect was a "mistake" which the revising barrister had power to correct by inserting "Division One" after "Occupiers' List."

Semble (per Lord Coleridge, C.J., and Manisty and Hawkins, JJ.), that the notice was good without amendment.

CASE stated by one of the revising barristers for the borough of St. Pancras.

The appellant, Robert John Hartley, was objected to as not being entitled to have his name retained on the Occupiers' List, Division One, of the south division of the borough, as a parliamentary voter for the borough and a county elector for the county of London.

The notice of objection served on the appellant was in the following terms: "I hereby give you notice that I object to your name being retained on the Occupiers' List of parliamentary voters for the southern division of the borough of St. Pancras and as a county elector for the county of London, on the following grounds, viz.," &c.

The list for the division was made out in three divisions, Division One consisting of persons qualified both as parliamentary voters and county electors, Division Two of persons qualified as

parliamentary voters only, Division Three of persons qualified as county electors only.

It was contended by the appellant that the notice was invalid, because it did not specify the division to which the objection referred, in accordance with the directions in Form I., No. 2 of Schedule III. to the Registration Act, 1885 (48 Vict. c. 15), s. 18. (1)

(1) By the County Electors Act, 1888 (51 Vict. c. 10), s. 4, sub-s. 1: 'The Registration of Electors Acts shall, so far as circumstances admit, apply . . . to the registration of county electors . . . ; and the lists of . . . county electors, and of occupation voters for parliamentary elections, shall, so far as practicable, be made out and revised together; and the Registration of Electors Acts shall accordingly . . .

(*b*) apply to every parish not situate in a municipal borough, in like manner as if such parish were a municipal borough to which the Parliamentary and Municipal Registration Act, 1878, applies, and the said lists of county electors and of occupation voters for parliamentary elections in such parishes shall be made out in divisions, as provided in the said Act," &c.

By s. 13: "All precepts, notices, and forms required for the purposes of the Registration of Electors Acts shall be altered in such manner as may be declared by Her Majesty in Council to be necessary for carrying into effect this Act, and clerks of the peace and town clerks shall alter their forms accordingly," &c.

By the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 15, sub-s. 2: . . . "Division One shall comprise the names of the persons entitled to be registered as parliamentary voters . . . and to be enrolled as burgesses. Division Two shall comprise the names of the persons entitled to be registered as parliamentary voters, but not to be enrolled as burgesses. Division Three shall comprise the names of the persons entitled to be enrolled as burgesses, but not to be registered as parliamentary voters," &c.

By s. 28, sub-s. 2: (A revising barrister) "may correct any mistake which is proved to him to have been made in any claim or notice of objection."

By the Registration Act, 1885 (48 Vict. c. 15), s. 18: "The forms and instructions contained in the 2nd and 3rd Schedules to this Act shall be used and observed . . . but a disregard of any form or instruction shall not of itself invalidate any list, notice, or other thing."

By an Order in Council made under the County Electors Act, 1888 (51 Vict. c. 10), s. 13, the forms in the 2nd and 3rd Schedule to the Registration Act, 1885, were altered, and the following form was inserted in the 3rd Schedule:

"FORM I. NOTICE OF OBJECTION.

No. 2.—(PARLIAMENTARY AND COUNTY GOVERNMENT.)

NOTICE of OBJECTION to be given to PERSON objected to.

To ——

I hereby give you notice that I object to your name being retained on the —— list as a parliamentary voter for the parliamentary borough of ——

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The revising barrister held that the notice was invalid, but that he had power to amend it. He did so by inserting the words "Division One" after "Occupiers' List," and expunged the name of the appellant and those of 507 other persons who had been served with notices of objection in similar terms. If the revising barrister was wrong the names in question were to be restored to the list.

Cyril Dodd, for the appellant. The revising barrister was right in holding the notice of objection bad, but was wrong in holding that he had power to amend it. The form of notice substituted under the County Electors Act, 1888, s. 13, in Schedule III. to the Registration Act, 1885, distinctly states that the division is to be specified. The omission was therefore more than a mere clerical error, and could not be corrected as a "mistake" under s. 28, sub-s. 2, of the Parliamentary and Municipal Registration Act, 1878. [He cited *Bridges* v. *Miller* (1), *Bollen* v. *Southall* (2), and *Barton* v. *Ashley*. (3)]

R. M. Bray, for the respondent, was not heard.

LORD COLERIDGE, C.J. We need not call on the counsel for the respondent. The revising barrister was right. It is unnecessary to decide whether or not this notice of objection was valid without amendment. Where a statute directs that a particular form shall be used, and a form is used which omits some essential element in the statutory form, the use of the defective form invalidates the proceeding. But in the case of this notice of objection, there is only a slight variance from the statutory form, and

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[and as a county elector for the county of ——] on the following grounds:

1. That [e.g., you have not occupied for twelve months (or six months, as the case may be) to July 15].

2. That

3.

Dated the —— day of —— 18—.

(Signed) A. B., of [*place of abode*] on the list of parliamentary voters [and county electors or burgesses] for the parish [*or* township] of ——.

Note. — The notice of objection should, if there be more than one list, specify the list, and if the list referred to is made out in divisions, should specify the division to which the objection refers, and if the list contains two or more persons of the same name, should distinguish the person intended to be objected to."

(1) 20 Q. B. D. 287.

(2) 15 Q. B. D. 461.

(3) 2 C. B. 4.

the notice refers in an unmistakeable manner to the list to which it is intended to refer, and to the only list which consists of the names of voters entitled to be registered in respect of the double qualification. The amendment may therefore have been, strictly speaking, unnecessary. But it was an amendment which, according to *Bollen* v. *Southall* (1) and other authorities, it was perfectly competent to the revising barrister to make. The defect which he corrected is a mistake, if ever there was one, in a notice of objection. The appeal will therefore be dismissed.

MANISTY, J. I am of the same opinion. For myself I regard the notice of objection as good without amendment. This conclusion is, I think, supported by *Barton* v. *Ashley* (2) and *Huggett* v. *Lewis* (3), two cases in which the Court of Common Pleas considered the effect of a similar direction in a form contained in one of the schedules to 6 & 7 Vict. c. 18.

HAWKINS, J. I am of the same opinion. The form here adopted by the objector could not mislead, and it is evident that he intended to comply with the statutory form but omitted one particular through mistake. If the notice as it originally stood, was, as I scarcely think it was, invalid, it is clear that the revising barrister did not exceed his power of amendment in correcting the mistake.

Solicitor for the appellant: *J. M. McDonnell.*
Solicitors for the respondent: *Halse, Trustram & Co.*

(1) 15 Q. B. D. 461. (2) 2 C. B. 4.
(3) 15 C. B. 245.

H. D. W.

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JONES *v.* KENT.

Parliament — Registration — Lodger Franchise — Claim to be placed on Old Lodger List — Declaration of Residence, Sufficiency of — Representation of People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 30, *sub-s.* 2 — *Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *ss.* 22, 23 — *Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18, *Sched.* 3, *Form H. No.* 2.

In a notice of claim delivered to overseers by a person claiming to be placed on the Old Lodger List, it appeared that the declaration of residence and the attestation were dated July 9, six days before July 15, the date of the expiration of the year of residence to which they referred:—

Held, that the case was governed by *Hersant* v. *Halse* (18 Q. B. D. 412), that the claim was bad on the face of it, and that the claimant was not duly qualified.

CASE stated by the revising barrister for the city of Gloucester.

The appellant was objected to by the respondent as not being entitled to have his name retained on the Old Lodger List for the parish of St. John the Baptist, the ground of objection stated in the notice being "that you have not complied with the statutory requirements in making your claim."

It appeared that at the time when the lists for 1888 were made out the appellant was on the register for the parish as a lodger. By a notice of claim delivered between July 15 and July 25, 1888, he claimed to be placed on the Old Lodger List in respect of the same lodgings. The notice was in form in accordance with Form H. No. 2, in Sched. 8 to the Registration Act, 1885, but the declaration of residence for twelve months prior to July 15 and the attestation were respectively dated July 9. The words "objected to" had not been added opposite the name of the appellant in the margin of the list published by the overseers in which the name appeared. This list had been made out and published by them in a regular manner according to s. 22 of the Parliamentary and Municipal Registration Act, 1878.

The respondent contended that the notice of claim did not shew a lodger qualification. The revising barrister held that the notice of objection was sufficiently specific, and that *Hersant* v. *Halse* (1) applied, and erased the name of the appellant and

(1) 18 Q. B. D. 412.

the names of thirty-nine other persons who were objected to on similar grounds, and whose appeals were consolidated.

Bompas, Q.C., for the appellant. The revising barrister was wrong. The grounds of objection are not sufficiently specific: *Smith* v. *Woolston*. (1) Again, the name of the appellant appearing as a voter in a list which was duly made out according to s. 22 of the Parliamentary and Municipal Registration Act, 1878 (2), it was not competent to the revising barrister to go

(1) 4 C. P. D. 73.

(2) By the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 30, sub-s. 2: "The claim of every person desirous of being registered as a voter for a member or members to serve for any borough in respect of the occupation of lodgings shall be in the form numbered 1 in sched. G (now Form H, No. 2 in sched. 3 to the Registration Act, 1885), or to the like effect, and shall have annexed thereto a declaration in the form and be certified in the manner in the said schedule mentioned, or as near thereto as circumstances admit: and every such claim shall after the last day of July, and on or before the 25th day of August in any year, be delivered to the overseers of the parish in which such lodgings shall be situate, and the particulars of such claim shall be duly published by such overseers, &c., in a separate list according to the form numbered 2 in the said sched. G" (now Form K, No. 3, in Sched. 2 to the Registration Act, 1885).

By the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 22: "Where a person is entered in respect of lodgings on the register for the time being in force, and desires to be entered on the same register in respect of the same lodgings, he may claim to be so entered by sending notice of his claim to the overseers of the parish in which his lodgings are situate on or before the twenty-fifth of July."

"The overseers shall on or before the last day of July make out a list of all persons so claiming, and if they have reasonable cause to believe that any person whose name is entered on the list is not entitled to be registered or is dead, shall add in the margin of the list opposite his name the words 'objected to' or 'dead,' as the case may be."

"The lists so made out shall be signed, published, and otherwise dealt with in the same manner as the alphabetical lists mentioned in s. 13 of the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18), and shall for the purposes of the Parliamentary Registration Acts be deemed to be lists of voters, and the provisions of the Parliamentary Registration Acts as to objections shall apply to such lists, and the persons against whose names the overseers have so written the words 'objected to' or 'dead' shall be deemed to be duly objected to."

Sect. 23: "In the case of a person claiming to vote as a lodger the declaration annexed to his notice of claim shall, for the purposes of revision be primâ facie evidence of his qualification."

Form H in Sched. 3 to the Registration Act, 1885, is headed "Form of notice of claim." No. 2 is as follows:—

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behind the list and examine the notice of claim: *Davies* v. *Hopkins*. (1) Even if he was entitled to do this, *Hersant* v. *Halse* (2)

"PARLIAMENTARY (LODGERS).

"To the overseers of the parish [*or* township] of ——.

"I claim to have my name inserted as a lodger among the parliamentary voters for the borough of ——, in respect of the qualification named below.

Name of claimant in full, surname being first.	Description of rooms occupied, and whether furnished or not.	Street, lane, or other place, and number (if any) of house in which lodgings situate.	Amount of rent paid.	Name and address of landlord or other person to whom rent is paid.
Stevens, John William.	Two rooms, first floor, furnished.	51, Brick Street.	16*s.* a week.	William Johnson, 51, Brick Street.

"I hereby declare that I have during the twelve calendar months immediately preceding the fifteenth day of July in this year occupied as sole tenant [*or* as joint tenant with ——], and resided in the above-mentioned lodgings, and that those lodgings are of a clear yearly value, if let unfurnished, of ten [*or* twenty] pounds or upwards (*a*), † and I hereby declare that I am on the register of parliamentary voters for the said parliamentary borough in respect of the same lodgings as above-mentioned, and I desire to have my name entered in the Old Lodgers List.†

"Dated the —— day of ——, 18—.

"(Signed) A. B. (*the claimant*).

"(*a*) Omit the words between crosses if they are not applicable.

"I, the undersigned, hereby declare that I have witnessed the above signature of the above-named [*here state the name of claimant*], at the date stated above, and that I believe the above claim to be correct.

"Dated the —— day of ——, 18—.

"(Signed) C. D., of —— [*state residence and calling of witness*].

"NOTE.—If the claim is in respect of different rooms successively occupied as lodgings in the same house, the notice of claim must specify each room, or set of rooms, so occupied.

"If the claimant is on the register in respect of the same lodgings, and desirous to have his name inserted on the Old Lodgers List, published on or before the first day of August, he must send in his claim on or before the twenty-fifth of July.

"In any other case he must send it in after the last day of July, and on or before the twentieth day of August.

"If there are two joint lodgers, the yearly value of the lodgings must be twenty pounds or upwards."

(1) 3 C. B. (N.S.) 376. (2) 18 Q. B. D. 412.

does not apply. There the lodger claimant did not deliver any claim. Here, the appellant did deliver a claim, and it is submitted that the claim is good, though the declaration and certificate are as regards date irregular. Sect. 30 of the Representation of the People Act, 1867 (1), and s. 23 of the Parliamentary and Municipal Registration Act, 1878 (1), speak of the declaration and attestation as "annexed" to the "claim." These are therefore for the purposes of revision separable from the claim, which may be and here is valid apart from them.

A. T. Lawrence, for the respondent, was not heard.

LORD COLERIDGE, C.J. I am of opinion that the revising barrister was right. An ingenious argument has been addressed to the Court, but it is plain that the case is governed by *Hersant* v. *Halse*. (2) The effect of that decision is that a "claim" is, under s. 30, sub-s. 2, of the Representation of the People Act, 1867, a necessary part of the parliamentary qualification of a lodger, and a condition precedent to his right to be registered. The word "claim" occurs twice in the first part of this sub-section, and is used in each case in almost, though not altogether, the same sense. Where the word occurs for the second time it, in my opinion, plainly means the assertion by the claimant of his statutory right in the statutory form accompanied by a declaration of residence and an attestation as required. If this were not so, the lodger claimant might omit with impunity both the declaration of residence and the attestation though the statute says that these "shall be annexed" to the application. Here the "claim" contains a declaration of residence which is dated before the expiration of the year of residence to which the declaration refers. Such a declaration is a nullity, and a claim containing such a declaration is bad on the face of it. The revising barrister was, therefore, right in erasing the names in question.

As to *Davies* v. *Hopkins* (3), that decision is distinguished in *Hersant* v. *Halse* (2), and has no bearing on revision as regards lodger claimants.

(1) Ante, p. 205 (note). (2) 18 Q. B. D. 412.
(3) 3 C. B. (N.S.) 376.

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MANISTY and HAWKINS, JJ., concurred.

Appeal dismissed.

Solicitors for appellant: *Windybank & Samuell, for T. H. Yates, Gloucester.*

Solicitors for respondent: *Edward Doyle & Sons, for Taynton, Sons, & Siveter, Gloucester.*

H. D. W.

Nov. 27; *Dec.* 1.

SMITH *v.* CHANDLER.

Parliament—Registration—Lodger Franchise—Notice of Claim, Sufficiency of—Registration of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 30, *sub-s.* 2—*Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18, *Sched.* 3, *Form H, No.* 2.

A notice of claim delivered by a lodger claimant differed from Form H, No. 2, in Sched. 3, to the Registration Act, 1885 (48 Vict. c. 15), in that it omitted the date of the attestation.

Held, on the authority of *Jones* v. *Kent* (ante, p. 204), that the omission was material and that the claim was invalid.

CASE stated by the revising barrister for the borough of Battersea and Clapham.

The appellant claimed for the first time to be registered as a lodger. It appeared that the notice of claim delivered by him was in the following form:

"To the overseers of the parish of Clapham.

"I claim to have my name inserted as a lodger among the parliamentary voters for the borough of Battersea and Clapham (Clapham Division) in respect of the qualification, &c.

"I hereby declare that I have during the twelve calendar months preceding the 15th day of July in this year occupied as sole tenant, and resided in the above-mentioned lodgings, and that, &c.

"Dated Aug. 13, 1888.

"(Signed) John Henry Smith.

"I, the undersigned, hereby declare that I have witnessed the above signature of the above-named J. H. Smith at the date stated above, and that I believe the above claim to be correct.

"E. J. T."

(With residence and calling).

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The notice of claim was objected to as insufficient, on the ground that the declaration of the attesting witness was not dated in accordance with Form H, No. 2, in Sched. 3, to s. 18 of the Registration Act, 1885. (1)

The notice was on a printed form, the use of which had been agreed upon by the agents of the political parties. The revising barrister held that the omission of the date of the declaration invalidated the notice of claim, and that he had not power to amend the notice, and disallowed the claim of the appellant and those of 260 other persons in whose notices of claim there was a similar omission, and whose appeals were consolidated.

W. Graham, (with him *H. C. Richards*,) for the appellant. The revising barrister was wrong. The claim was in conformity with s. 30, sub-s. 2, of the Representation of the People Act, 1867. The attestation is not an essential part of the claim of a lodger.

[LORD COLERIDGE, C.J. The Court has practically decided it to be so in *Jones* v. *Kent*. (2)]

The attestation is constructively dated. The witness testifies to having seen the claimant sign the claim on August 13, and the claim must have been delivered to the overseers before August 20. The date of the attestation must therefore be between these dates. It is also submitted that the omission of the date is not a material omission, and that such omission also amounted to a mistake in the claim which the revising barrister could and should have corrected under s. 28, sub-s. 2, of the Parliamentary and Municipal Registration Act, 1878. [He cited *Jones* v. *Jones* (3), and *Eaden* v. *Cooper*. (4)]

No counsel appeared for the respondent.

LORD COLERIDGE, C.J. I am of opinion that this appeal should be dismissed. The point raised was practically decided in *Jones* v. *Kent*. (2) The Court there held that under s. 30, sub-s. 2, of the Representation of the People Act, 1867, the declaration and

(1) In this form the declaration of the attesting witness is as follows:—

"I, the undersigned, &c.," as above down to "to be correct."

"Dated the —— day of ——, 18—.

"(Signed) C. D., of ——"

(*State residence and calling of witness*)."

See the note to the preceding case of *Jones* v. *Kent*, p. 206.

(2) Ante, p. 207.

(3) Law Rep. 1 C. P. 140.

(4) 21 L. J. (C.P.) 32.

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attestation are part of the statutory claim of a claimant to the lodger franchise. A schedule to s. 18 of the Registration Act, 1885, contains a form of claim for lodgers, which, according to that section, is to be "used and observed." This form is not according to the form in that schedule, inasmuch as the attestation is not dated. The revising barrister has held that the omission is material, and that the claim is invalid in consequence of it, and I agree with him.

It is said that the date of the attestation may be collected from other parts of the claim, but I doubt this. It is said that the omission is not material, but s. 18 of the Registration Act, 1885, says otherwise, and I certainly consider the date material. The case of an affidavit is analogous, and it is, generally speaking, essential to the validity of an affidavit that it be dated. It is to be observed that there was here no proof of the date at which the witness actually signed, and this circumstance distinguishes the case, as I think, from that of *Jones* v. *Jones* (1), as to the correctness of the decision in which I do not express any opinion. I also think that the revising barrister had no power to amend the claim. The omission was not due to a mistake. It was, as he knew, deliberately made. The agent chose to draw up a form of notice for the use of lodger claimants which differed from the statutory form of notice, and in which there now proves to have been a material omission.

MANISTY, J. I am of the same opinion. It was held in *Wood* v. *Chandler* (2) that the proviso in s. 18 of the Registration Act, "a disregard of any form shall not of itself invalidate a notice" did not apply to a notice in which a material part of the form was omitted. Here a material part of a statutory form has been deliberately struck out. It needs no argument to shew that such an omission must be fatal.

HAWKINS, J., concurred.

Appeal dismissed.

Solicitors for the appellant: *Dubois, Reid & Williams.*

(1) Law Rep. 1 C. P. 140. (2) 20 Q. B. D. 297.

H. D. W.

SMITH, APPELLANT; THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF THE PARISH OF BIRMINGHAM, RESPONDENTS.

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June 1;
Nov. 15.

Poor-rate—Small Tenements—Rateable Value—Rating of Owners—Deductions—"Voids" and Losses of Rent—Cost of Collection—Water-rate—Hypothetical Tenant—6 & 7 *Wm.* 4, *c.* 96, *s.* 1.

The appellant was assessed to the poor-rate as owner of a small house let by the week to artizans, the landlord paying all outgoings. On appeal against the rate to quarter sessions the appellant claimed that in arriving at the gross estimated rental deductions should be made in respect of losses by reason of the house frequently remaining unlet and void for some time, and by reason of losses of rent through inability of tenants to pay, and in respect of the necessary cost of collection of the rent actually received. The recorder found that it was practically impossible to let the house on any other terms than those on which the appellant let it; that owing to voids and losses of rent the landlord received on an annual average 5 per cent. less than the aggregate of the weekly rents, and had to pay 5 per cent. as the cost of collecting the rents actually received; but he also found that, assuming a tenant from year to year could be obtained, the house could be reasonably let for a sum representing fifty-two times the weekly rent, the landlord paying all usual tenants' rates and taxes and the water-rate:—

Held, that the gross estimated rental ought to be fixed by ascertaining the rent at which the house might reasonably be expected to let to a tenant in actual occupation from year to year free of the various tenant's payments specified in 6 & 7 Wm. 4, c, 96, s. 1; and not by assuming a hypothetical tenant who did not himself occupy the house, but sublet it to weekly tenants, and therefore that the deductions claimed in respect of voids, losses of rent, and cost of collection ought not to be made.

CASE stated by the Recorder of Birmingham.

Upon an appeal to the Court of Quarter Sessions for the Borough of Birmingham from the decision of the special sessions of the justices of the borough confirming a rate for the relief of the poor, made by the respondents in respect of the appellant's house, No. 40, Alexandra Street, the recorder dismissed the appeal with costs, subject to a case for the opinion of the Queen's Bench Division, stating the following material facts:—

1. The house in question is of the character and description known as artizans' or workpeople's dwellings, of which the appellant owns a large number in the borough of Birmingham. They are let by the week, and the appellant, as landlord, pays

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all outgoings in respect of them, including water-rates, poor, and other local rates, and the sums required for repairs, &c.

2. The weekly rent of the house No. 40, Alexandra Street, is 5*s.*, and it has been agreed that the rate in respect of that house shall be a test case in respect of all the rates appealed against, and that the rateable value of the other houses comprised in the appeal, as well as of all the other houses of the same description belonging to the appellant, shall be fixed in accordance with the decision of the Court in regard to No. 40.

3. In the rate appealed against the appellant's name was put in as owner, and the name of P. E. Oldaker as occupier; the property was described as "house;" the gross estimated rental was 9*l.* 10*s.*, and the rateable value 7*l.* 5*s.*

4. The appellant contended that the following deductions ought to be made in ascertaining the gross estimated rental, namely:—

(1.) A percentage on 13*l.*, being fifty-two times the weekly rent, in respect of "voids and losses" (fixed as hereinafter appears at 5 per cent.).

(2.) For cost of collecting rent, 5 per cent. on the sum of 12*l.* 7*s.*, being fifty-two times the weekly rent, less 5 per cent. for voids and losses.

(3.) Ten shillings, the full amount of the water-rate, as if paid by the tenant.

(4.) In the alternative 8*s.*, the amount of the water-rate actually paid by the landlord in pursuance of his agreement to compound, as hereafter explained.

(5.) Poor and other local rates at 6*s.* 8*d.* in the pound.

With reference to all the foregoing deductions the appellant contended that the hypothetical tenant from year to year contemplated by the Parochial Assessment Act of 1836 must, for the purpose of ascertaining the gross estimated rental, be deemed not to occupy personally, but to sublet the tenements to weekly tenants as occupiers on the terms mentioned in paragraph 1, himself paying all the outgoings, as therein mentioned, and that the propriety of the several deductions claimed must be decided on the footing of that interpretation of the statute. In other words, that the question must be determined precisely as if the

present appellant's reversionary interest in the premises occupied by his sub-tenants were a tenancy from year to year, and the problem to be determined was what deductions should be made in ascertaining the rent he should pay to his ground landlord.

The respondents, on the other hand, contended that such hypothetical tenant must be deemed to be in actual occupation of the tenement, and the gross estimated rental fixed in accordance with the rent which he might reasonably be expected to give as a tenant from year to year under a landlord who paid in respect of it all the outgoings mentioned in paragraph 1. They contended that the appellant was not entitled to the deductions so claimed by him in respect of voids and losses, collection, and water-rate; that voids and losses of rent were inseparable from the enjoyment of all rateable hereditaments, and in no way affected the rateable value of such hereditaments, inasmuch as rates are payable only for so long as the hereditaments are let, unless provided for by the statutes relating to the compounding for rates.

The recorder decided that the appellant's construction of the statute was erroneous, and that of the respondents was correct, and all his determinations of law and fact in regard to the propriety of the several deductions claimed, and in regard to the amount of the rent at which the said house might reasonably be expected to let from year to year, if so let, proceeded on the footing of that decision.

5. It was agreed that in order to arrive at the rateable value a deduction of 25*l.* per cent for repairs, &c., must be made from the gross estimated rental.

8. In regard to voids and losses it was proved that it is practically impossible to let houses of the description to which those in question belong on other terms than those mentioned in par. 1; that the persons to whom such tenements are usually let are artizans or workpeople; that owing to fluctuations in trade, change of employment, and other causes, such persons from time to time move to other districts, and the houses formerly occupied by them are often left void, and are unable to be re-let for several weeks, while at other times from like causes the occupiers fall out of employment and are unable to pay their rents; that as a result of such voids and losses the landlord of such tenements does not

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receive on an average in the course of the year fifty-two times the amount of the weekly rent reserved, but some smaller amount. The recorder found, as a matter of fact, on the evidence before him, that the average annual amount of such voids and losses in respect of the appellant's weekly houses, if allowable at all, was equal to 5 per cent. of the total annual rents payable in respect of them; but he upheld the respondents' contention that no deduction whatever could properly be made on this account, and decided that the rent at which the said house might reasonably be expected to let from year to year, if so lettable, the landlord paying all usual tenants' rates and taxes and water-rates, was £13.

9. With regard to the cost of collection, it was proved that the rents of houses let on weekly tenancies are usually collected by agents or collectors on behalf of the landlord, and that the usual remuneration for the labour and cost of so collecting them is 5 per cent. on the amount collected, and that the appellant's rents in respect of the property in question were so collected for him on those terms. It was also proved that the usual remuneration for collecting the rents of houses let by the year or the quarter is $2\frac{1}{2}$ per cent. on the amount collected. The recorder found on the evidence before him that 5 per cent. was a reasonable remuneration for collecting the rents of weekly houses, but held that no deduction at all was allowable on this account.

10. With regard to the water-rate: The borough of Birmingham is supplied with water by the corporation of Birmingham under and by virtue of the provisions of the Birmingham Corporation (Consolidation) Act, 1883 (46 & 47 Vict. c. lxx.), and the Acts incorporated therewith, and there is practically no other source of water supply, although taking a supply of water from the corporation is not made compulsory by the statute. Owners of houses of the description in question are liable to the corporation for the payment of the water-rate, and the amount paid by the occupiers as rent is according proportionately greater than it would be if the occupiers provided directly for their own supply. The owners are, on the other hand, enabled and permitted, in consideration of their agreeing to pay the water-rate in respect of their houses, whether the same are occupied or not, to compound for its payment at a reduced rate, and the appellant in this

case has so compounded in respect of the houses in question. The amount of the water-rate in respect of No. 40, Alexandra Street, which would be payable if not compounded for, is 10*s.* The amount actually paid by the appellant in pursuance of his agreement to compound for the same is 8*s.* The respondents contended that the appellant was not entitled to either deduction on account of water-rate. The recorder held that the respondents' contentions were correct, being of opinion that in point of law the payment for water was in the nature of a rent, and was not a tenant's rate within the meaning of the statute.

11. The poor and other local rates to be deducted are 6*s.* 8*d.* in the pound on the rateable value of the premises rated.

The case also stated in figures the alternative amounts of the deductions which should be made from the rate, if all or any of the deductions claimed were allowed.

The questions for the opinion of the Court were as follows:—

1. What is the proper hypothesis to be made in applying the Parochial Assessment Act to a tenement of the description in question?

2. Is the appellant entitled to the deduction of 5 per cent. on account of voids and losses?

3. Is he entitled to the deduction of 5 per cent. for collection?

4. Is he entitled to the deduction of the full amount of the water-rate as if not compounded for?

5. Alternatively is he entitled to the deduction of the amount actually paid by him in respect of water-rate?

If the Court shall hold that the appellant is entitled to all, or any two, of the deductions claimed for voids and losses, for collection, and water-rate, then the order of the recorder is to be quashed.

If the appellant is not entitled to any of the deductions claimed for voids and losses, for collection, and water-rate, or one only of such deductions, the order of the recorder is to be affirmed.

When the case was argued in the Queen's Bench Division on June 1, 1888, the Court sent it back to the learned recorder to re-state par. 8, which he did as follows:—

"I repeat the facts found and set forth in the first eight lines

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of par. 8 of this case. Assuming, however, for rating purposes, that a tenant from year to year could be obtained, I find that the house 40, Alexandra Street, could be reasonably expected to be let from year to year at the rent of 13*l.* a year, the landlord paying all usual tenants' rates and taxes, and the water-rates.

"I further find that with respect to house property of this description, whether let by the week or by the year, the landlord would be unable, by reason of voids and of losses by non-payment of rent, to collect more than 95 per cent. of the rent.

"I decided that the appellant was not entitled to the deduction claimed by him for voids and losses on the grounds contended for by the respondents in par. 7 of this case, and also because I was of opinion that the rental at which the premises may be expected to let from year to year, and not the amount of rent actually received for them, is the proper criterion to be taken into consideration in the rating of such premises."

Jelf, Q.C., and *W. Wills*, for the appellant.

Sir R. E. Webster, A.G., *Alfred Young*, and *Hugo Young*, for the respondents.

The arguments sufficiently appear from the statements in the case, and from the judgment of Wills, J.

[The following statutes and authorities were referred to:— 6 & 7 Will. 4, c. 96; 32 & 33 Vict. c. 41; *Dobbs* v. *Grand Junction Waterworks Co.* (1); *Smith* v. *Corporation of Birmingham* (2); *Reg.* v. *Grand Junction Ry. Co.* (3); *Reg.* v. *Llantrissant* (4); *Reg.* v. *London and North Western Ry. Co.* (5)

Cur. adv. vult.

Nov. 15. WILLS, J., read the following judgment:—

The appellant in this case is the owner of certain small tenements for which he has compounded under 32 & 33 Vict. c. 41.

In a poor-rate for the parish of Birmingham he has been rated at a gross estimated rental of 9*l.* 10*s.* and at a rateable value of 7*l.* 5*s.* The appellants claimed before the learned Recorder of

(1) 9 App. Cas. 49.
(2) 11 Q. B. D. 195.
(3) 4 Q. B. 18.
(4) Law Rep. 4 Q. B. 354.
(5) Law Rep. 9 Q. B. 134.

Birmingham to have certain elements of diminution, in order to ascertain the gross estimated rental, introduced into the calculation, all of which the learned recorder has disallowed.

They are shortly as follows: The house selected by way of illustration is let to weekly tenants at 5*s.* a week. It is found that it is practically impossible to let it for longer periods. It is also found that owing to voids and losses by non-payment of rent the landlord receives in the year at least 5 per cent. less than the aggregate of the weekly rents for fifty-two weeks. He employs a collector, and it is the common practice with respect to such tenements for landlords to do so. The appellant also pays the water-rate. It is in respect of these items that the questions in the present case are raised.

With respect to the deduction claimed for water-rates, I am clearly of opinion that it is a charge for water sold and supplied and in no sense rent. The premises of themselves do not afford water, and the tenant would get none but for the supply through the company's pipes, and it presents, therefore, no analogy to the case of premises comprising a well, which being part of the actual land occupied must be taken into account when estimating the rent. This deduction, therefore, will have to be made from the 13*l.*

The next contention of the appellant relates to the allowance for voids and losses by nonpayment of rents, in respect of which he claims that he ought to be rated at that portion only of the 13*l.* which actually finds its way into his pocket. He argues that, inasmuch as the only practical way of dealing with the property is to let it to weekly tenants, if he had a tenant from year to year that tenant would be obliged to sublet it in the same way as he does, and that, as the tenant would not in that way make 13*l.* out of it, he never would give 13*l.* a year for it, and therefore the amount of hypothetical yearly rent cannot be higher than the 13*l.* less the deductions in question.

In order to clear the ground for the discussion of this question I will notice, in order to get rid of them, certain statutory provisions which I must not be supposed to have overlooked, but which in my judgment do not affect the principles upon which this case must be decided.

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The Act 59 Geo. 3, c. 12, s. 19, contains very peculiar provisions for rating the owners instead of the occupiers of small tenements. It introduced, in cases which fall under it, a standard of rating which has nothing to do with the net annual value as interpreted by 6 & 7 Will. 4, c. 96, s. 1. That Act, however, has nothing to do with the present case, and it is clear that under the 32 & 33 Vict. c. 41, which is the Act relating to the rating of owners instead of occupiers under which the present case falls, no special provisions are made for arriving at the value of the property, and although the owners are persons to be rated, and are entitled to certain deductions on the amount which would be payable if the occupiers were rated, the general principles of rating apply, and the value for the purpose of the rate must be ascertained in the same way as if the occupiers were rated.

Certain statutory provisions are made also for the case of occupiers for short periods. They, when rated, are exempted from payment of more than the proportion of the rate due for one quarter of a year, and are enabled to deduct the amount paid by them from the rent due to the owner (32 & 33 Vict. c. 41, ss. 12): and provision is further made that an outgoing tenant shall be liable only for the proportion of the rate corresponding to his period of occupation (Ibid. s. 16).

These, however, are mere statutory qualifications and exemptions engrafted upon the general system, and do not go beyond the specific instances to which they are made applicable. They do not affect the question with which we have to deal, and in order to see what the principle is upon which the amount of the rating is to be calculated, we must look at the state of things existing before these, or similar enactments (all of which are long subsequent to the origin of our rating system) were passed.

Now, nothing can be clearer than that, apart from the special enactments referred to, the person to be assessed always was and is the person in actual occupation. Before those statutes were passed it was the case, and it still is so where they do not apply, that the weekly tenant who may be in actual occupation of the tenement when the rate is made was, or is, the person liable. Until 17 Geo. 2, c. 38, s. 12, he was at once liable for the whole amount; and even under that Act he was liable for the whole

amount until an incoming tenant stepped into his shoes; and it was held that where a tenant only occupied for a fortnight after the rate was made, and the succeeding tenant did not come in for some months, the first tenant was liable for the apportioned part of the total rate answering to the period when there was no occupation. The mere fact, therefore, that the tenant upon whom the rate is properly made is only a weekly tenant has, apart from the statutes mentioned, no bearing upon the question how much of the rate, calculated upon proper principles, he ought to pay when made, and it seems to me that the only bearing it has upon the question of what the quantum of the hypothetical yearly rent ought to be is that it may, or may not, according to circumstances, render the amount of his weekly rent a bad test of what the natural rent by the year would be. It is to no purpose to say that such property cannot in practice be let by the year: no more can railways, canals, docks, or gasworks. The Act of Parliament requires the assumption of a tenancy from year to year to be made, and you can no more impugn the hypothesis of such a tenancy in rating matters than in logic you are permitted to deny your opponent's hypothetical premiss. You must assume a landlord willing to let, and a tenant willing to take by the year; and having done so, you must get in the best way you can at the rent which, under an agreement brought about by the compromise of the conflicting interests of the man who wants to receive as much as he can and the man who wants to pay as little as he can, would be arrived at under such circumstances.

There are many cases in which statutory limitations upon the mode of enjoyment of the tenement exist. In such cases the hypothetical tenant is treated as holding subject to the same statutory restrictions; but there is no case that I am aware of in which those limitations are other than incidents to the occupation, or in which they have destroyed the power of actual occupation, and they therefore afford no support to the view put forward here that the practical impossibility of finding a tenant from year to year justifies a resort to a new principle in rating law by which the theory of actual occupation is discarded.

The person to be rated, then, being the occupier and not the

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owner, the hypothetical tenant is brought upon the scene, not for the purpose of changing one of the cardinal conditions of rating, but simply for the purpose of giving, or perhaps it might be more correctly said of illustrating, the principle by which quantum is to be arrived at. The tenant whose supposed dealing with the landlord is to be the test of quantum is still to be a tenant or occupier; and there is, as far as I can see, no warrant either in principle or authority for the claim of the appellant in this instance to turn him into a hypothetical landlord sub-letting the tenement of which he could only be rated as the actual occupier. To treat the hypothetical tenant, who although a suppositious person is still, ex hypothesi, a tenant or occupier, as himself a landlord and not in occupation, appears to me to be a contradiction in terms and at variance with everything that I have ever understood to be the law upon this subject.

It is true that by 6 & 7 Wm. 4, c. 96, s. 1, you have to get at the "net annual value," after which words come the interpretation of the phrase, "that is to say, the rent at which the same might reasonably be expected to let from year to year free of" various specified charges usually paid by the tenant, and deducting certain specified items of expense which the landlord generally incurs, and which enable him to maintain the premises in a state to command such rent as aforesaid.

With such words to deal with it is quite useless to consider what has been said in *Dobbs's Case* (1) or elsewhere as to the meaning of "annual value" in Acts in which the defining words of 6 & 7 Wm. 4, c. 96, s. 1, are not to be found. In the Act now under consideration the words "net annual value, that is to say," are superfluous, and might just as well be left out. "Net annual value" means just as much as, and no more and no less than, the words which follow that expression, and which I have already cited.

It seems to me to follow that, if you are compelled to assess the occupier, whatever his actual period of past or prospective occupation, upon the assumption that there is a tenancy for a year, it is idle to talk of his being assessed at a less sum than he otherwise would be assessed at because he may in fact occupy for

(1) 9 App. Cas. 49.

a week only. The hypothetical tenant and the actual tenant are two separate and distinct entities. The hypothetical tenant will give neither more nor less for his year's occupation because the actual tenant only wants to occupy for a week or a fortnight. The tenant who, ex hypothesi, is to occupy for a year cannot be put as a person who ought to pay a rent less than the fair rent for a year on the ground that there will be a week or a fortnight out of the year when the occupation will cease. That would be to contradict the hypothesis which you are bound to assume.

This is the view which I understand the learned recorder of Birmingham to have acted upon. He says in effect, "I see no reason why, if there were a tenant from year to year, he should not be willing to pay for the year at the same rate as the actual tenants pay for the week." So far it is a pure question of fact, and whether the decision be one at which I should myself arrive or not, if the question of fact were for me, is a matter I have nothing to do with. I must not be supposed when I put it in this way to be suggesting that there is anything unreasonable or improper in the view he has taken of this question of fact, but it is simply out of place for this Court, which is not a Court of Appeal on the question of fact, to express any opinion about it either one way or the other.

It is said, however, that the finding of the learned recorder after the case was remitted to him for further statement shews that 5 per cent. ought to come off this initial amount of 13*l*. He says that upon property of this description the landlord would be unable by reason of voids and non-payment of rent to realise more than 95 per cent. of the value. As far as voids are concerned, they are excluded, in my opinion, by the statutory hypothesis of a tenancy from year to year. It is the old point over again. If the hypothetical yearly tenant is to be treated as an occupier, the deduction for voids can have no place in the estimate. Nor does it seem to me that the fact that this class of tenant is often impecunious is material. The question is what a tenant might be reasonably expected, bonâ fide, to bind himself to pay. Mr. Wills, in his able contribution to the arguments for the appellants—none the worse for not being long—treated the finding of the learned recorder as equivalent to saying that the

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full sum was a mere paper rent, and not the real sum supposed to be arrived at between the parties as the rent intended to be paid. I do not so understand him. There is an inherent difficulty in applying statutory hypotheses which are unreal in fact. It is exemplified by the difficulties which have arisen under the Bills of Sale Act, 1878, where the Act of Parliament requires a receipt which is not in any ordinary sense an assurance to be dealt with as an assurance, and under the Employers' Liability Acts, which say that a servant shall in certain cases have the same rights as if he were not a servant, without saying whether he is to be regarded as an absolute stranger, or outsider, or as a person present by invitation, or as a person lawfully upon the premises; and it is not very easy to say whether this is a circumstance which would find its way into the amount of rent, or whether it is, apart from that, a loss which in respect of rent fairly arrived at between the parties would, notwithstanding the fact that it might be expected from the outset, really fall upon the landlord, without affecting the rent. I can equally well conceive circumstances under which it might, and circumstances under which it might not, affect the bargain between the parties. It might induce the landlord to ask more, but I do not see that that would lead the tenant to be willing to give more than he would if he was likely to have no difficulty in paying. A landlord will often be willing to let to an exceptionally careful or solvent tenant at a rent less than that which he would ask from a more uncertain paymaster or a less conscientious person. But no one ever heard of the introduction of such a question into the calculation of what a yearly tenant might be expected to give. It is a matter, as it seems to me, far too remote and speculative to be a necessary element in the estimation, and I think the learned recorder was quite justified in discarding it.

The cost of collection, I am quite clear, is no deduction. It is only claimed, and can only be claimed, on the hypothesis that the rated occupier can be treated as himself a landlord and not in occupation.

It is conceded that the allowance of the deduction for water-rate alone is not sufficient to reduce either the gross or the net rateable value below the respective amounts appearing in the

present rate; and as all the other items in dispute are, in my opinion, erroneously claimed as deductions it follows that the rate must stand.

So far I have dealt with the matter without reference to the fact that the present appellant compounded for the rates as landlord, and is accordingly rated under 32 & 33 Vict. c. 41; and what has been said would have applied to King's appeal had it been necessary to go into his case. It is sufficient with respect to this fact to point out that the case of the landlord so compounding is one less favourable for the appellant than that of the tenant paying the rates, inasmuch as to the landlord compounding very large deductions are made under the Act in question, as to which it is very difficult to see what they are for unless they embrace some, at all events, of the deductions now claimed.

The order of sessions, therefore, must be confirmed, and the appeal dismissed.

GRANTHAM, J., concurred.

Judgment for the respondents.

Solicitors for appellant: *Ross & Douglas Norman, for A. L. Crockford, Birmingham.*

Solicitor for respondents: *James Neale, for W. Horton & Redfern, Birmingham.*

W. A.

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[IN THE COURT OF APPEAL.]

ROE *v.* SIDDONS.

Easement—Right of Way—Grant of Way by general Words—"Ways now or heretofore held or enjoyed"—Way at Date of Grant physically incapable of use with principal Subject of Grant.

In 1872 the owner of two adjoining pieces of land granted one to the plaintiff and the other to the defendant. The grant to the plaintiff contained the general words, "together with all ways, &c., easements, and appurtenances whatsoever to the said tenement and premises hereby granted, or any part thereof, now or heretofore held or enjoyed, or reputed or known as part or parcel thereof, or appurtenant thereto."

Prior to 1852 the occupiers of the two tenements had used in common a formed private road, for the purpose of going to and from their respective tenements to the high road.

There was access to the plaintiff's tenement from the high road without passing over the private road, but the only access to the defendant's tenement was by means of that road. In 1852, by the permission of the owner, the then occupier of the plaintiff's tenement built a wall which entirely separated his tenement from the private road, and from that time down to 1872, and afterwards, with one exception, down to the issue of the writ, the occupiers of the plaintiff's tenement made no use of the private road, but obtained access to the tenement directly from the high road:—

Held, that under the circumstances the inference that the word "heretofore" in the grant to the plaintiff was used in its ordinary grammatical meaning was rebutted, and that no right to the use of the private road passed to him.

Appeal by the defendant against an order of the County Court at Ashby-de-la-Zouch, by which an injunction was granted to restrain the defendant from obstructing by a gate a private road over which the plaintiff claimed a right of way.

The following statement of the facts is taken from the judgment of Cave, J., with additions from the judgment of A. L. Smith, J.

In the year 1852 the plaintiff and the defendant, or their predecessors in title, occupied adjoining tenements belonging to the same landlord, and each of them had for many years previously used the strip of land in question for the purpose of getting to and from his tenement to the high road. The strip of land was, in fact, a formed and stoned road, and down to 1852 the occupiers of the two tenements had repaired it jointly. There was access

to the plaintiff's tenement from the high road without passing over the strip of land in question. There was no such access to the defendant's premises. In 1852 the plaintiff's tenement was altered, and, by permission of his landlord, the then occupier separated the private road from his tenement by a dry stone wall, and thenceforward, down to 1872, ceased to use the private road, obtaining access to his premises directly from the high road. In 1872 the owner sold both tenements, and by conveyances of even date and in similar terms conveyed one to the plaintiff and the other to the defendant. The conveyance to the plaintiff contained a grant to him of the premises with the words, "all which premises are delineated in the plan drawn in the margin of these presents, and therein numbered 14 and 15, and coloured blue; together with all buildings, ways, waters, rights, easements, and appurtenances whatsoever to the said tenement and premises hereby granted, or any part thereof, now or heretofore held or enjoyed, or reputed or known as part or parcel thereof, or appurtenant thereto." On the plan the road in question was delineated as a road, but it was not coloured blue. In 1873 the plaintiff used the private road for the purpose of conveying materials to the back of his premises for the building of a privy. These materials were taken by cart up the private road, and were then lifted over the dry stone wall. With this exception the plaintiff and his predecessors in title had not used the private road since 1852.

W. Graham, for the defendant.
Aspland, Q.C., for the plaintiff.

CAVE, J. (after stating the facts as above):—The question for us is, whether the general words in the conveyance to the plaintiff amount to a grant of the way as it was enjoyed before and down to 1852.

In *Polden* v. *Bastard* (1) it is laid down by Erle, C.J., at p. 161, that "there is a distinction between easements, such as a right of way, or easements used from time to time, and easements of necessity, or continuous easements. The cases recognise this distinction, and it is clear law that, upon a severance of tene-

(1) Law Rep. 1 Q. B. 156.

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ments, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shews an intention that they should pass." It is not necessary to consider the doctrine laid down, or supposed to have been laid down, in *Thomson* v. *Waterlow* (1) and *Langley* v. *Hammond* (2), for I agree with Fry, J., in *Barkshire* v. *Grubb* (3), that that doctrine has been overruled by *Kay* v. *Oxley* (4) and *Watts* v. *Kelson.* (5) In *Brown* v. *Alabaster* (6) Kay, J., held that where, upon the severance of two tenements, there is a formed way over one to the other, used and obviously formed for the use of that other, such a way is considered by the authorities to be a continuous and apparent easement which, upon the severance, will pass to the grantee by implied grant, without any general words at all. That is not, indeed, the question here, for, although there was a formed way, it was not at the time of the grant obviously formed for the use of the plaintiff's tenement, from which, indeed, it was separated by the dry stone wall which had no opening in it. The question we have to decide is of a different kind, viz., whether by the words used in the conveyance, "together with all ways to the said tenement now or heretofore held or enjoyed, or reputed or known as part or parcel thereof or appurtenant thereto," a right of way over the strip of land in question was granted to the plaintiff. Now I agree that this way cannot pass under these words as a way "now," that is, in 1872, held or enjoyed, with the premises. Is it not, however, a way which "theretofore," that is, previously to 1872, had been held and enjoyed with the plaintiff's premises? It is admitted that down to 1852 the plaintiff's predecessors used and enjoyed this way as a way to the back of the tenement, and that it was then a formed road, obviously used by the predecessor of the plaintiff in common with the predecessor of the defendant, as a road to their respective tenements, and that the two jointly repaired it. It cannot, I think, be doubted that, if the conveyance to the

(1) Law Rep. 6 Eq. 36.
(2) Law Rep. 3 Ex. 161.
(3) 18 Ch. D. 616.
(4) Law Rep. 10 Q. B. 360.
(5) Law Rep. 6 Ch. 166.
(6) 37 Ch. D. 490.

plaintiff had been executed to his predecessor in 1852, a right of way over this private road would have passed as "now held or enjoyed" with the premises; and, if that is so, why does it not pass under the grant of 1872 as a way "*theretofore*" used or enjoyed therewith? Suppose the conveyance had contained the words "all ways now or in 1852 enjoyed therewith," can it be doubted that those words would have amounted to a grant of this right of road? And, if such words would amount to a grant, why do not the words "heretofore used or enjoyed" therewith pass this right of way? Surely "heretofore" must include the year 1852. It is said that the way does not pass, because in 1872 it was not an apparent road, and I quite agree that if the words had been only "now used and enjoyed" herewith, that would have created a difficulty, perhaps an insuperable one; but must we not look to see whether "heretofore," that is, in 1852, it was not an apparent road? and, as it was undoubtedly such then, why was it not then, in 1852, held and enjoyed with the premises, and, if in 1852 it was so held and enjoyed, how can it be said that in 1872 it had not been so held and enjoyed theretofore, that is, previously to 1872? The grantor has chosen to use the word "heretofore," which obviously means more than "now," and I can see no reason why it is not to apply to the state of things existing in 1852. If the word "heretofore" applies to a road enjoyed twelve months before 1872, why does it not apply to a road held and enjoyed in 1852, and, if it does not apply to a road held and enjoyed twelve months before 1872, what is the meaning to be given to the words "or heretofore," and how do they extend the words "now held or enjoyed"? This reasoning is, to my mind, much strengthened by the plan in the margin of the plaintiff's conveyance. This road, which had been used and enjoyed by the plaintiff's predecessors down to 1852, is there coloured as a road, and described as a road. For what purpose, except as an indication that it was a road which had then or theretofore been used or enjoyed with the plaintiff's premises?

Even assuming that this right of way was not created by the language used in the grant of 1872, I think it might fairly be contended, on the authority of *Espley* v. *Wilkes* (1), that, as it is

(1) Law Rep. 7 Ex. 298.

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coloured on the plan in the plaintiff's conveyance as a road, and is there called a road, and is delineated as bounding the plaintiff's land, the grantor was estopped from saying that this strip of land was not a road. In *Roberts* v. *Karr* (1) Sir J. Mansfield, C.J., says (p. 503): "If you have told me in your lease this piece of land abuts on the road, you cannot be allowed to say that piece of land on which it abuts is not the road." In the same case Lawrence, J., says, "If a man buys a piece of ground described as abutting upon a road, does he not contemplate the right of coming out into the road through any part of the premises?" For my part, I can see no distinction between describing the land conveyed as abutting on a road, and delineating it in a plan as doing so. Had the deed not contained, as I think it does, a grant of this right of way, I am of opinion that, on the authority of these two last cases, there was, by reason of the delineation in the plan of the road as bounding the plaintiff's premises on one side, an implied grant of the way to the plaintiff, which clearly entitles him to maintain this action against the defendant, who admittedly has no title at all to the soil of the road. I prefer, however, to rest my decision on the combined operation of the plan and the general words in the conveyance, that is to say, on the basis that the plan, coupled with the general words in the grant, shews a clear intention on the part of the vendor to recreate this way as it existed in 1852, that is, to entitle the plaintiff to use the road as a way to any part of his premises on which it abuts. In my opinion, the county court judge was right in the conclusion to which he came, and the appeal should be dismissed with costs.

A. L. SMITH, J. (after stating the facts), continued:—The plaintiff did not and could not contend that he had a right of way over the road either by reason of ownership of the soil or by prescription, or of necessity, but he contended that, by the general words of the conveyance of September 30, 1872, he had a grant of the way, and was thereby entitled to maintain the action.

In *Polden* v. *Bastard* (2), Erle, C.J., in delivering the unani-

(1) 1 Taunt. 495.

(2) Law Rep. 1 Q. B. 156.

mous judgment of the Exchequer Chamber, says (p. 161): "There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognise the distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shews an intention they should pass." This is also cited and affirmed by Mellish, L.J., in *Watts* v. *Kelson.* (1)

It is obvious that the plaintiff cannot claim a right to this road as being an easement of necessity, or in its nature continuous, for there was no necessity, and at the date of the conveyance of 1872 it had been disconnected for twenty years.

Are then, the, general words upon which the plaintiff relies sufficient to carry a way like this, disconnected as it had been from the property conveyed for twenty years before the date of the conveyance?

In *Thomson* v. *Waterlow* (2), it was decided by Lord Romilly in April, 1868, that, inasmuch as there was no right of way in that case before the unity of possession, or, in other words, inasmuch as there was no *right of way*, but only a *user* of a way, before the conveyance, the words "together with all ways, easements, and appurtenances thereto appertaining, and with the same now or *heretofore* occupied or enjoyed, &c." (almost identical with the words in the present case) did not pass the right to use the way to the purchaser.

In May of the same year *Langley* v. *Hammond* (3) came before the Court of Exchequer, and Kelly, C.B., held, following Lord Romilly in *Thomson* v. *Waterlow* (2), that a grant of hereditaments "with all ways thereunto now used, occupied, and enjoyed," only passed those ways which had at some former time been used *as of right* therewith. Martin, B., agreed with him. Bramwell, B., however, agreed only upon the ground that in that case there was no defined road at all to pass by the words in

(1) Law Rep. 6 Ch. at p. 173. (2) Law Rep. 6 Eq. 36.
(3) Law Rep. 3 Ex. 161.

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the conveyance. The learned Baron said (p. 170): "I am not prepared to say, and I do not understand the Master of the Rolls to have decided, that a right of way *could* not pass under words such as those here used, even though there had always previously been unity of ownership and of possession; and should the case arise, I should like for time to consider before I assented to the doctrine supposed to have been laid down."

In *Watts* v. *Kelson* (1), Mellish, L.J., in delivering the judgment of himself and James, L.J., says (at p. 174): "We may also observe that, in *Langley* v. *Hammond* (2) Bramwell, B., expressed an opinion, in which we concur, that, even in the case of a right of way, if there was a *formed road* made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words," or, as was pointed out by Kay, J., in *Brown* v. *Alabaster* (3), at all events by the words which we are now discussing. See also what Fry, J., says in *Barkshire* v. *Grubb.* (4)

In 1875 the Court of Queen's Bench in *Kay* v. *Oxley* (5) were decidedly of opinion that, under a grant containing words equivalent to those used in the present case, it could make no difference in law whether the right of way was only de facto used and enjoyed, or whether it was originally created before the unity of possession, and then ceased to exist as a matter of right, so that in the one case it would be created as a right de novo, in the other merely revived.

In my judgment the law is this, that the general words now in question are capable of passing a right to a way, which way in fact existed at the date of the conveyance, whether as of right or not. But the point now to be determined is, as it seems to me, whether these general words will pass a way which did not exist at all at the date of the conveyance, and which as a matter of fact had not existed for twenty years before. That depends upon what is the true meaning of the words "now or heretofore enjoyed as part or parcel thereof or appurtenant thereto."

(1) Law Rep. 6 Ch. 166.
(2) Law Rep. 3 Ex. 161.
(3) 37 Ch. D. at p. 503.
(4) 18 Ch. D. 616.
(5) Law Rep. 10 Q. B. 360, at p. 367.

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My judgment is as follows:—Given a way existing at the date of the conveyance, apparently for the use of the tenement conveyed, then the right to use that way might, and, indeed, I think would, be carried by such general words, whether such way existed as of right or not before the date of the conveyance, and whether or not it had been used continuously down to that date. But the way must be a way in fact, existing apparently for the use of the tenement at the date of the conveyance. The easement claimed being that of a way, it is not a continuous easement. The user of it might well have been intermittent. To carry such a way, in my opinion, the words *heretofore enjoyed* are inserted after the word "now," and not to grant a right of way not then existent, and which had ceased to exist some twenty years before.

I am sorry to differ from my brother Cave upon this point. The two cases he alludes to as shewing that, by the conjoint operation of the plan and the words in this case, the way is granted, are, in my judgment, very distinguishable, the ratio decidendi being, as I understand them, that, unless the rights of way therein claimed were carried by the deeds, the house intended to be built could not have been built at all, or, if built, would have been absolutely unapproachable and inaccessible, and the objects of the parties would have been entirely frustrated.

I can find no justification in the authorities for holding that the general words used in this case will carry a non-existent way, and, in my judgment, the appeal should succeed, and judgment should be given for the appellant, with costs.

The defendant appealed.

1888. Dec. 6, 7. *W. Graham*, for the defendant. The words of the conveyance to the plaintiff do not carry this right of way under the circumstances. The words are not merely "heretofore held or enjoyed," but also "appurtenant thereto." If, before the severance of two tenements formerly held by one owner, the owner has indicated an intention that an easement, such as a way over one of them, should cease to exist, he has shewn an intention that it shall no longer be "appurtenant" to the other. Primâ facie, a way used by the owner of two closes for the

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purpose of going from one to the other is not "appurtenant" to the former: *Kay* v. *Oxley*. (1)

Aspland, Q.C., and *Cluer*, for the plaintiff. The question is, what is the true construction of the words of grant? The words are "held or enjoyed" therewith, "*or* reputed or known as appurtenant thereto." This way was "reputed or known as appurtenant to" the plaintiff's tenement. All the authorities on the subject are collected in Gale on Easements, 6th ed. pp. 66-83. In *Bayley* v. *Great Western Ry. Co.* (2) it was held that, on a grant to a railway company of a piece of land on which was a stable, "together with all rights, members, or appurtenances to the hereditaments belonging, or occupied or enjoyed as part, parcel, or member thereof," the right to use a private road, which the vendor had many years previously made over his own land from the highway to the stable for his own convenience, and had ever since used, passed to the company, at any rate for so long as the company should use the premises as a stable. In *Thomas* v. *Owen* (3) it was held that, under a lease of a farm, with the general words "all houses, buildings, and appurtenances thereto belonging," a right of way over a private road, which was not a way of necessity, passed to the lessee. As to the extent of the meaning of the word "heretofore," see the *Earl of Leicester's Case* (4). In *Hall* v. *Byron* (5), Hall, V.C., in deciding that a right of common had not been recreated by general words in a conveyance, laid particular stress on the omission of the ordinary words "or heretofore or at any time heretofore." This road was in constant use by the occupier of the plaintiff's tenement, until in 1852 the then occupier, by altering his premises, made it unnecessary to use it. If the grant to the plaintiff had been made in 1852, the words "now used" would have given him the right to use the road. If so, the words "heretofore used" in the grant of 1872 must equally give him that right.

W. Graham, in reply. An intention must be shewn to create a new easement. The word "heretofore" is intended only to apply to a case in which there is at the time of the grant an

(1) Law Rep. 10 Q. B. 360, 365.
(2) 26 Ch. D. 434.
(3) 20 Q. B. D. 225.
(4) 3 Dyer, 362 a.
(5) 4 Ch. D. 667.

apparent existing easement capable of being used, though it is not then in actual use. If before the grant the owner has altered the character of the property, and has made it impossible to use the road, that shews that he had no intention of creating a new easement by the use of the word "heretofore": *Kay* v. *Oxley*. (1) In *Wheeldon* v. *Burrows* (2), Thesiger, L.J. (at p. 49), stated the general rules governing cases like the present.

LORD ESHER, M.R. It is doubtful whether the defendant has any right whatever to put up the gate across the road in question; in all probability he is a mere trespasser. But the plaintiff has to make out his own title. He alleges that he has a right of way along the road. Apparently the soil of the road remains in the owner who made the grants to both the plaintiff and the defendant. The question is, whether the plaintiff has the right of way which he claims. He says that he is entitled to that right of way by virtue of the general words in his conveyance—"together with all buildings, ways, waters, rights, easements, and appurtenances whatsoever to the said tenement and premises hereby granted, or any part thereof, now or heretofore held or enjoyed, or reputed or known as part or parcel thereof or appurtenant thereto." These words, the plaintiff says, give him, not only rights of way then in existence, but all rights of way theretofore existing. It seems to me that the question is to be determined solely upon the true construction of the words of the grant. Abstruse questions as to unity of possession may be raised, but the real crucial question is the construction of the deed. In construing it we have a right to look at the surrounding circumstances existing at the date of the deed, and moreover the words are to be construed so as to effect the intention of the parties, which is to be gathered from the instrument. The deed must be construed according the ordinary rules of construction, one of which is, that you are entitled to look at the circumstances existing at the date of the deed. Those circumstances will give very little help in the construction if the words of the deed are clear, but they will help very much if the words are ambiguous. We are entitled, therefore, to look at the state of

(1) Law Rep. 10 Q. B. 360, 367. (2) 12 Ch. D. 31.

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things existing in 1872. At that time there was existing a formed metalled road just outside the boundary of the plaintiff's land, but at one end that road led to nothing but a blank wall. That, however, is not decisive against the existence of a right of way, for a right of way may exist over a road which is only a cul-de-sac. But there are words in the deed which evidently refer to a state of things existing before 1872, and we may therefore look at the state of things existing before that date. We are, therefore, driven back to the year 1852, and we find that the road in question was then a formed road, and that there was access from it at one end to the premises which have since been granted to the plaintiff. If the general words in the grant were not ordinary words, words commonly (though, I agree, not always) used in a conveyance when there is nothing in fact corresponding to them, I should say it would be impossible to hold that they did not apply to a state of things existing at any previous time. But, from the judgment of Hall, V.-C., in *Hall* v. *Byron* (1), I am satisfied that such words are frequently used in deeds when there is nothing to which they can apply—that they are mere common form words, and that it is not necessary to imply that they were used in their strict grammatical sense. But I think that the fact that such words are used in a deed is primâ facie evidence of an intention to use them according to their grammatical construction. In 1852 the road was used by the person who was then in occupation of the plaintiff's property, and, if the conveyance to him had been made then, the general words used would, according to the authorities, even without the use of the word "heretofore," have given the plaintiff a right of way over the road. We have to construe a deed executed in 1872. In 1852 the physical condition of the property was altered (and it so remained until 1872) to this extent, that the building of a wall by the then occupier of the plaintiff's property rendered access from it to the road impossible. During the whole of the period from 1852 to 1872 the road could not be used so as to benefit the plaintiff's property. It is conceded that, if the word "heretofore" had not been inserted in the conveyance to the plaintiff, a right to use the road as of right would not have been

(1) 4 Ch. D. 667.

given to the plaintiff by the other words, for it would not have been true to say that the road was "now" held or enjoyed with the property. The plaintiff, therefore, relies upon the word "heretofore," and primâ facie that does give him the right to use the road. The question is, whether that primâ facie right is not rebutted by the circumstances existing in 1872. It is obvious that, in order to make the grant of a right to use this road a beneficial one to the plaintiff's property, the then existing condition of things must be altered. Is not that sufficient to countervail the somewhat slight inference of intention which is to be drawn from the use of ordinary general words which are so often used in a deed without any particular intention? It is impossible to give an exhaustive statement of the circumstances which will countervail the primâ facie meaning of the words, but I can state some circumstances which will do so. When, in order to maintain the right which it is sought to enforce, it is necessary, not only to create the right to use the thing, but also to create the thing itself which is to be used, the primâ facie meaning of the words will be rebutted. In the present case the thing to be used is a road leading up to the plaintiff's premises, and to be used with them, and, in order that it may be used, you would have to create the road itself. Again, though perhaps this is only another mode of stating the same proposition, when, in order to maintain the alleged right, it is necessary to alter the physical condition of the property from what it is at the time of the grant to what it formerly was, this also prevents the ordinary general words from being treated as disclosing any intention to give the right. Both these considerations when applied to the present case shew that the primâ facie meaning of the words is not the true meaning, and that there was no intention to grant the right to use the road. In my opinion the judgment of Cave, J., was wrong, and we must adopt that of A. L. Smith, J.

FRY, L.J. Every grant must be construed with reference to its subject-matter, and the condition of that subject-matter at the time of the grant. In this grant we find a reference to a former time, and we must have regard to the condition of the subject-matter at that time. Both the plaintiff's and the defendant's

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tenements formerly belonged to the same owner. The road in question skirted one side of the plaintiff's property, and it was used for many years, not only for the purposes of the defendant's close, but also for the purposes of a barn which then stood on the plaintiff's property. In 1852 the barn was converted into cottages, and from that time, with one exception, when some bricks were carted up the road and thrown over the plaintiff's wall, there has been no use of the road for the plaintiff's property, but it has been used exclusively for the purposes of the defendant's property. The conveyance to the plaintiff in 1872 contained the general words which we have to construe. It seems to me that the better construction is to read the words "as part or parcel thereof or appurtenant thereto," as governing all the previous dispositions. It may be that the words "held or enjoyed" are alternative to "or reputed or known as part or parcel thereof or appurtenant thereto," but it appears to me that this will make no difference in substance. The material word for the present purpose is "ways." Of course, strictly speaking, the owner of two tenements can have no easement over one of them in respect of the other. When the owner of Whiteacre and Blackacre passes over the former to Blackacre, he is not exercising a right of way in respect of Blackacre; he is merely making use of his own land to get from one part of it to another. The word "way" in a grant is not an apt word to create a new right of way; it is a word descriptive of an existing right—a right of way over the land of another person. The question we have to decide is, whether any right of way was created by the general words in the conveyance to the plaintiff? In my judgment it was not. The word "way" is not descriptive of a new right of way, and the word "appurtenant" is not appropriate to create it. In *Thomas* v. *Owen* (1), in delivering the judgment of this Court, I said (at p. 231): "No doubt the word 'appurtenances' is not apt for the creation of a new right, and the word 'appurtenant' is not apt to describe a right which had never previously existed; and therefore the mere grant of all appurtenances, or of all ways appurtenant to the principal subject of the grant has been held in many cases not to create a new right of way where the right was not pre-existing

(1) 20 Q. B. D. 225.

at the date of the grant. But, from as long ago as the fourth year of Philip and Mary (*Hill* v. *Grange* (1)) the word 'appurtenanances' has easily admitted of a secondary meaning, and as equivalent in that case to 'usually occupied.'" Taking the words of the grant before us in their strict legal meaning, they are not apt to create a new right of way which never existed before 1872. And, looking at the circumstances then existing, they are strong to repel the intention of creating such a right. The road then existing led up to a blank wall bounding the plaintiff's property, and the only way in which it could be used for the benefit of the plaintiff's property was by throwing things over the wall.

But it is said that, if the deed had been executed in 1852, the right to use the road would have been carried by the word "now," and therefore it must be created in 1872 by the word "heretofore." This is an ingenious argument, but, in my judgment, it is not a sound one. If the deed, supposing it to have been executed in 1852, would have created a right of way, it would have done so, not by force of the primary meaning of the words used, but because, looking at the then existing circumstances, it would have been right to give to the word "appurtenant" a secondary meaning. But, if that be so, we must in construing a deed executed in 1872, have regard to the state of circumstances then existing. In my judgment, therefore, the argument fails.

LOPES, L.J. It is not suggested that before the unity of possession of the two tenements there existed any right of passing over one of them to the other—that the one was dominant and the other servient. The way was used for the convenience of the person who owned both the properties. Did the owner, when he made the grant to the plaintiff in 1872, intend to create a new right of way? It is true that in order to answer that question we must look at the words of the grant, but it is equally true that we must look at the subject-matter with which the grantor was dealing, and at its condition at the date of the grant. If there were nothing to negative the ordinary meaning of the words, I should unhesitatingly say that we ought to give effect to every

(1) Plowd. 170.

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Lopes, L.J.

word of the grant. But, if the condition of the subject-matter at the date of the grant was inconsistent with attaching to the words their ordinary grammatical meaning;—if that meaning would necessitate a physical change in the subject-matter, I should say it could not have been the intention of the grantor that the words of the grant should bear their ordinary grammatical meaning. Ever since the year 1852, this road has ceased (with one exception) to be used for the purposes of the plaintiff's property. It has no terminus at one end, and the only way in which it could be so used would be by throwing things from it over the plaintiff's wall, or by pulling down the wall. Under these circumstances it seems to me impossible to give to the words of the grant their strict grammatical meaning. I agree with the judgment of the other members of the Court.

Appeal allowed.

Solicitors for defendant: *S. W. Johnson & Son.*
Solicitors for plaintiff: *Field, Roscoe, & Co.*

W. L. C.

[IN THE COURT OF APPEAL.]

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Dec. 15.

SHARPE *v.* WAKEFIELD AND OTHERS, JUSTICES OF WESTMORELAND.

Inn—Licence to sell excisable Liquors—Renewal—Discretion of Justices—Licensing Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 1—*Licensing Act*, 1872 (35 *&* 36 *Vict. c.* 94), *s.* 42—*Licensing Act*, 1874 (37 *&* 38 *Vict. c.* 49), *s.* 26.

The discretion of the justices as to granting or refusing a licence by way of renewal under the Licensing Act, 1828 (9 Geo. 4, c. 61), and the Licensing Acts, 1872 and 1874, in respect of excisable liquors to be drunk on the premises, is absolute, provided it be exercised judicially.

On an application to justices under the Licensing Act, 1828, s. 1, for the renewal of a licence to sell excisable liquors by retail to be drunk on the premises the justices refused to renew the licence on the grounds of the remoteness of the inn from police supervision, and the character and necessities of the neighbourhood. An appeal to quarter sessions was dismissed. On a case stated:—

Held (by Lord Esher, M.R., Fry and Lopes, L.JJ., affirming the judgment of the Queen's Bench Division) that the discretion vested in the justices under the Licensing Act, 1828, s. 1, had not been affected by the Licensing Acts, 1872 and 1874, and that it was therefore competent to them to withhold the licence on the grounds stated.

APPEAL from the decision of a Divisional Court (reported 21 Q. B. D. 66), confirming an order of the Westmoreland Quarter Sessions.

On a case stated for the opinion of the Court it appeared that the appellant, Susannah Sharpe, owner of the Low Bridge Inn, Kentmere, Westmoreland, appealed to the Court as a person aggrieved by an order of the licensing justices of the Kendal division, refusing to grant to William Ridding a licence by way of renewal for the sale of all intoxicating liquors at such inn. The justices refused to renew the licence on the grounds of "the remoteness of the inn from police supervision, and the character and necessities of the neighbourhood." The court of quarter sessions, after hearing evidence on these subjects, upheld the order of the justices, and dismissed the appeal. It was objected that, under the Licensing Acts, 1828, 1872 and 1874, neither the justices nor the court of quarter sessions had jurisdiction to refuse a licence by way of renewal on these grounds. The ques-

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tion for the opinion of the Court was whether or not the licensing justices for the Kendal division and the court of quarter sessions had such jurisdiction.

The divisional court confirmed the order of quarter sessions.

On appeal,

Candy, Q.C., and *L. Sanderson*, for the appellant. The discretion given to the justices under the Licensing Act, 1828 (1), as to the renewal of licences, has been limited by s. 42 of the Licensing Act, 1872 (2), and s. 26 of the Licensing Act, 1874 (3),

(1) 9 Geo. 4, c. 61, s. 1: "There shall be annually holden a special session of the justices of the peace (to be called 'the general annual licensing meeting') for the purpose of granting licenses to persons keeping or being about to keep inns, alehouses and victualling houses, to sell excisable liquors by retail to be drunk on the premises therein specified . . . and it shall be lawful for the justices . . . assembled at such meeting or at any adjournment thereof . . . to grant licenses for the purposes aforesaid, to such persons as they the said justices shall, in the execution of the powers herein contained and in the exercise of their discretion, deem fit and proper."

(2) 35 & 36 Vict. c. 94, s. 42: "Where a licensed person applies for the renewal of his license, the following provisions shall have effect:—

"(1.) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices so to attend.

"(2.) The justices shall not entertain any objection to the renewal of such license, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such license has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any license to a future day, and require the attendance of the holder of the license on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given.

"(3.) The justices shall not receive any evidence with respect to the renewal of such license which is not given on oath.

"Subject as aforesaid, licenses shall be renewed and the powers and discretion of justices relative to such renewal shall be exercised as heretofore."

(3) 37 & 38 Vict. c. 49, s. 26: "Whereas by s. 42 of the principal Act it is enacted that a licensed person applying for the renewal of his license need not attend in person at the general annual licensing meeting unless he is required by the licensing justices so to attend: Be it enacted that such requisition shall not be made save for some special cause personal to the licensed person to whom such requisition is sent.

"It shall not be necessary to serve copies of notices of any adjournment of a general annual licensing meeting on holders of licenses or applicants for licenses who are not required to

to cases in which some objection can be raised personal to the applicant. One object of these later Acts was to protect the vested interest of the owner of a licensed house. *Reg.* v. *Smith* (1) is against the appellant, though it is submitted that it was not rightly decided, but *Reg.* v. *Justices for Market Bosworth* (2) supports his contention.

[LOPES, L.J. *Reg.* v. *Smith* (1) does not appear to have been cited in that case.]

It would be a great hardship if the owner of a licensed house could have his property rendered of little or no value without there being any complaint against the house or its occupant, or the mode of carrying on the business, and such was not the intention of the legislature.

[He cited *R.* v. *Sylvester* (3); *Reg.* v. *Justices of Liverpool* (4); *R.* v. *Recorder of Dublin* (5); *Stephens* v. *Watson.* (6)

Addison, Q.C., and *Poland*, for the respondents, contended that in the case of sale of excisable liquors on the premises nothing in subsequent legislation had affected the absolute discretion given to the justices by the Licensing Act, 1828.

Candy, Q.C., in reply.

LORD ESHER, M.R. It is clear that very large interests are involved in the decision of this case, and that it is one that demands great care, but in the end I feel bound to construe the Acts of Parliament on which our decision turns according to the ordinary rules of construction. It is plain that if the discretion which is claimed to be vested in the magistrates is not exercised with the greatest care irreparable injury and in some cases injustice may be done.

We have to construe several Acts, the first of which is the Licensing Act, 1828, under which the case is stated. The justices

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attend at such adjourned annual general licensing meeting.

"A notice of an intention to oppose the renewal of a license served under s. 42 of the principal Act shall not be valid unless it states in general terms the grounds on which the renewal of such license is to be opposed."

(1) 48 L. J. (M.C.) 38.

(2) 56 L. J. (M.C.) 96.

(3) 2 B. & S. 322; 31 L. J. (M.C.) 93.

(4) 11 Q. B. D. 638.

(5) I. R. 11 C. L. 412.

(6) 1 Salk. 45.

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stated the grounds on which they went, and the court of quarter sessions upheld their decision. The question asked is, whether the justices or the court of quarter sessions had jurisdiction in respect of either of the objections, because if they had jurisdiction as to one of them that is sufficient to support their decision. Now what is the rule of construction to be applied? It is that the words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute.

Now the Licensing Act, 1828, constitutes special licensing sessions of the justices of the peace in every division for the purpose of granting—not excise licences but—magistrates' licences to persons keeping or being about to keep inns, alehouses, or victualling houses, to sell excisable liquor by retail, to be drunk or consumed on the premises therein specified. It is impossible to suppose but that the legislature must have foreseen that if such licences were to be granted annually they would apply to two classes of houses, either a house requiring a licence for the first time, or a house in respect of which a licence by way of renewal is asked for. I say by way of renewal, for although it may not be correct in point of law to call it a renewal, as the licence only lasts for a year and then expires, it is a convenient form of expression. The word "grant" is used as to the obtaining licences for both these classes of houses and the same discretion is given to the justices in both cases: there is no distinction between them, and that discretion is, in terms, unlimited. In every case therefore of renewal under this statute there is an unlimited judicial discretion as to the granting of the licence, subject to an appeal under s. 27 to the court of quarter sessions, which is to have the same power as had been conferred on the licensing justices.

The next question is whether in any other statute is to be found any legislation that alters the previously existing law. By the Licensing Act, 1872, s. 42, provision is made for the renewal of a licence. The application is made under the former Act, but the person making it need not attend in person unless he is required by the licensing justices so to attend. That certainly does not affect the discretion of the justices, nor does the 2nd

sub-section, which relates to the giving a seven-day notice, or, in the absence of such notice, to the adjournment of the case. The 3rd sub-section relates to evidence being given on oath, and then "subject as aforesaid," that is subject to these regulations as to the hearing and adjudication, "the powers and discretion of the justices relative to such renewal shall be exercised as heretofore." So, far, then as this statute is concerned the discretion of the justices is not affected.

But then s. 26 of the Licensing Act, 1874, deals with s. 42 of the Licensing Act, 1872, and limits the power of the justices to require the personal attendance of the applicant to cases in which there is some special cause personal to the applicant. This can have no effect on the question of the discretion of the justices, as it is confined to their power to insist on personal attendance.

On this view of the statute there is an end of the case, and we need not consider any of the cases or the other Acts that have been cited, but I may say that s. 19 of the Beerhouse Act, 1869, supports the view I have taken, though it is not necessary to rely on it.

I think, therefore, that this appeal must be dismissed.

FRY, L.J. This case is one of so great importance that it is right I should say a few words in expressing my judgment upon the matter. With the conclusions arrived at by the Master of the Rolls I entirely concur. We have, I think, no need to go behind the statute of 1828. The earlier history of licensed public-houses or beerhouses in this country is immaterial for the purpose of construing that statute. We find there that the legislature required a special session of the justices to be held for the purpose of granting licences to persons keeping or about to keep inns, ale-houses, and victualling-houses for the sale of excisable liquors. Now it is obvious that two classes of persons are referred to—those who at the time the sessions are held actually keep houses and desire the renewal of their licences, and those persons who are not keeping houses, but who are desirous of keeping, or are about to keep houses, if they can obtain licences —persons, therefore, who were applying for their first licences. The power vested in the magistrates assembled at such meetings

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is (I am reading the clause shortly) to grant licences for the purposes aforesaid to such persons "as they (the said justices) shall in the execution of the powers herein contained and in the exercise of their discretion, deem fit and proper." Nothing is to my mind more plain than that the exercise of the discretion is one and the same with regard to the persons who are keeping and the persons who are about to keep public-houses. No distinction is drawn between the two classes. Their existence as separate classes, if you like so to say, is recognised; the jurisdiction and power of the magistrates are alike in both cases, and the discretion is alike in both cases. The only doubt which, it seems to me, can be raised upon the construction of the words which I have read arises from the collocation of the words "such persons as the justices in their discretion shall deem fit and proper." It might have been said, and has been said, I believe, in the case to which I am about to refer, that that confines the discretion of the justices to the character of the person; but when the 9th section of the statute is looked at, it is seen that that no such contention is tenable for a moment. The discretion is of a much wider character. That was fully, and, to my mind, most satisfactorily explained by Lush, J., in giving the judgment of the Court of Queen's Bench in the case of *Reg.* v. *Justices of Lancashire.* (1) Having adverted to the points which I have just referred to, he says: "It is therefore obvious that the words relied on by the appellant point not merely to the merits of the applicant, but must be read in a wider sense, as referring to the merits of the application; and they authorize, and therefore by implication require the justices to govern their discretion, in granting or withholding the licence, by reference not only to the qualification of the persons applying and to the suitableness of the house, but to other considerations also. Those considerations must include the nature of the locality, the population, the number of houses already licensed, and all other circumstances bearing on the question, whether it is fit and proper in the interests of the public, for whose benefit these Acts are passed, that an additional licence should be granted." Now that the discretion to be exercised in the case of the second application

(1) Law Rep. 6 Q. B. 97.

to renew, if you like to so call it, and the first application is the same, I have already said, to my mind is apparent from the structure of the statute itself. That view is expressed as being undoubted law by Cockburn, C.J., in the case of *Reg.* v. *Smith* (1), where he referred to the statute of George IV. as one "whereby there was the same discretion given to the justices whether the licence asked for was a new one or by way of renewal." Now if that plain construction of the statute and that authority required any confirmation, I should find it in the statute of 1869, because ss. 8 and 19 to my mind do import, or tend to import, that the legislature conceived the magistrates to have an unlimited judicial discretion in the case of renewals, and in the case of renewals the same discretion that they had in cases of first grants, and that by those sections the legislature desired in particular cases to limit that discretion. I think, therefore, the plain conclusion to be drawn is that the statute of 1828 created the same discretion in the justices in cases of renewal as in cases of first grant.

We have, therefore, to consider whether the subsequent legislation has in any way taken away or diminished that discretion. It is to be borne in mind that in the year 1869 the legislation was passed to which I have already referred, and that that had the effect of bringing the holders of beerhouse licences under the jurisdiction of the magistrates, and bringing them, to a considerable extent, within the operation of the statute of 1828, although with certain important differences. Now one of the provisions of the statute of 1828, namely, the 12th section, required the attendance of the applicants; and it seems that by parity of legislation the beerhouse holders were also required to attend, and the results of that are stated, and I have no doubt stated accurately, to have been inconvenient. In 1872 the legislature passed an Act which in many important particulars dealt with these licences. It took away the right of appeal in the case of all first applications for a licence, whether the magistrates refused or granted those applications; it retained the right of an appeal only in cases of renewal. The legislature introduced the disqualification of premises, that is to say, it rendered in certain

(1) 48 L. J. (M.C.) 38.

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cases the property itself incapable of being that in respect of which licences could be granted to any person, and it introduced corresponding clauses enabling the owner of property to protect himself against such disqualification. Now I refer to those clauses only because our attention has been drawn to them by Mr. Candy, who has desired to say that the Act of 1872 was intended to protect, as he would say, the vested interests of the licence-holder. It seems to me that nothing of the sort can be safely predicated of that Act. It introduces a good many things against licence-holders, and it naturally introduces certain provisions to enable the persons who were affected by the earlier provisions to defend themselves. We have therefore, I think, really only to deal with the 42nd section of the statute of 1872. It seems to me that the object of the section was simply to alter the procedure. It was to get rid of the attendance of the crowd of people who came to the annual brewster sessions. It was, in the next place, to introduce certain provisions for dealing with objections which might nevertheless be taken, but could not be taken fairly in the absence of the persons who were affected. Lastly, it required that evidence in cases of renewals should be given on oath; and then, having provided for these things, the section said this, "Subject as aforesaid licences shall be renewed, and the power and discretion of justices relative to such renewal shall be exercised as heretofore." In other words, it said the discretion given by the Act of 1828, which was the same in the case of renewals as in the case of first grants, was still to be exercised in the case of renewals. That, I think, is the plain, obvious sense of that section. Then comes the last piece of legislation with which it is necessary to deal—the statute of 1874. This is strictly an amending statute. It is mainly occupied with amendments of the Act of 1872. I presume that in the working of the extensive alterations which were introduced into the law by the statute of 1872 certain difficulties or defects had been discovered. It is to get over those difficulties and heal those defects that the statute of 1874 was passed, and accordingly it describes the Act of 1872 as the principal Act, and enacts that the Acts of 1872 and 1874 shall, so far as is consistent with the tenor of the Acts, be construed as one Act. Then we come to the 26th section, which

recites s. 42 of the earlier Act, and is plainly only a section amending s. 42. It enacts that the requisition, which is the first part of s. 42, shall not be made save for "some special cause personal to the licensed person to whom such requisition is sent." I confess those words are the only ones which have caused me any perplexity in the present case. It might seem that the word "personal" is used strictly in its proper signification; that the cause of objection must be something in the person of the applicant. That would go to exclude the discretion of the justices in everything except an objection to the personal character of the man. It would shut out the character of the house; it would shut out the consideration of the surrounding circumstances; the character of the edifice, its remoteness from police supervision, and everything which might have reference to the interests of the public, except only the individual character of the man. That might have been the meaning of the words, but in my judgment that is not their meaning. I think that it is impossible to suppose that if it was intended to introduce such a revolution as I have referred to in the power of the justices of granting renewals, some explicit words would not have been used. I think that the true meaning of those words is, that the justices shall not give general notices to all the publicans who apply at the sessions to attend them. We are told, and I daresay accurately, that that had been the practice at some quarter sessions between the Act of 1872 and the Act of 1874, and the meaning is, "You shall not give these general notices, but you must consider the case of each individual, and the notice given must be something which relates to the individual or to his house, and to his case in particular, and not to all publicans in general." I am induced to come to that conclusion for several reasons. I have already adverted to one, that I think that such an enormous change in the jurisdiction of the magistrates as is suggested would be too much to put upon those words. Another reason is this: Towards the end of the section I find a provision that the notice of the intention to oppose shall state in general terms the grounds upon which the renewal of such licence is to be opposed. Now observe; if it be true that the ground of character only is to be taken, instead of there being grounds on which the renewal of such licence can be opposed, they are all reduced to one, yet here the legislature refers to the

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grounds without saying that they are any less numerous or less wide than they were before the section was passed. Again, and this is perhaps what influenced me more than anything else—I am bound to read the two Acts and the two sections together, and reading them together they come to this: The 1st sub-section of s. 42 must be read in this way—he need not attend in person at the general annual licensing meeting unless he is required by the licensing justices so to attend for "some special cause personal to the licensed person to whom such requisition is sent." The second clause about entertaining the objection must be amended by adding after the words "to oppose the renewal of such licence," "stating in general terms the grounds upon which the renewal of such licence is to be opposed." Those amended sub-sections are still followed (because it is all one Act) by the concluding words of s. 42, "subject as aforesaid licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore." If the legislature had meant to amend s. 42 by limiting that discretion which they had retained and maintained in the statute of 1872, you would have found unquestionably words addressed to that portion of the section. But as they stand they must be read, as subject, and subject only, to the particular provisions of s. 42 as modified by this s. 26 in the Act of 1874. For these reasons I am clearly of opinion that the decision of the Divisional Court is right.

LOPES, L.J. I am of the same opinion. The Act of 1828, on which, in my view, the question of the authority of the justices in this case turns, was applicable, not merely to the state of things which was in existence when it was passed, but was intended to govern future applications until the Act was repealed or altered. The Act has been dealt with by subsequent legislation, but this particular matter of the discretion of the justices in a case like the present has not been interfered with. The justices, therefore, had jurisdiction, and the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *J. W. Sykes, for F. W. Watson, Kendal.*

Solicitors for respondent: *Nichol, Son, & Jones, for John Bolton, Kendal.*

A. M.

COREN *v.* BARNE.

1889
Jan. 28

Practice—Garnishee Order—Sufficiency of Affidavit in support of Application for—Rules of Supreme Court, Order XLV., *r.* 1.

On an application for a garnishee order under Order XLV., r. 1, it is sufficient for the affidavit to state that the deponent is informed and believes that the garnishee is indebted to the judgment debtor.

APPLICATION on behalf of the plaintiff as judgment creditor for a garnishee order for the attachment of a debt alleged to be due to the defendant the judgment debtor. The application was supported by an affidavit by the solicitor to the judgment creditor stating that the deponent was informed and verily believed that the garnishee was indebted to the judgment debtor. Mathew, J., at chambers, referred to the Court the question of the sufficiency of the affidavit.

Whitehouse, in support of the application. The affidavit is sufficient under Order XLV., r. 1. (1) Neither the judgment creditor nor his solicitor can have personal knowledge as to the indebtedness of the garnishee. [He referred to *Marples* v. *Somervail*, cited in the Annual Practice for 1889, p. 648.]

THE COURT (Denman and Stephen, JJ.) granted a garnishee order nisi.

Garnishee order nisi granted.

Solicitors for the judgment creditor: *Brownlow & Howe.*

(1) By Order XLV., r. 1: "The Court or a judge may, upon the ex parte application of any person who has obtained a judgment or order for the recovery or payment of money, either before or after any oral examination of the debtor liable under such judgment or order, and upon affidavit by himself or his solicitor stating that judgment has been recovered, or the order made, and that it is still unsatisfied, and to what amount, and that any other person is indebted to such debtor, and is within the jurisdiction, order that all debts owing and accruing from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment or order; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the Court, or a judge, or an officer of the Court, as such Court or judge shall appoint, to shew cause why he should not pay to the person who has obtained such judgment or order the debt due from him to such debtor, or so much thereof as may be sufficient to satisfy the judgment or order."

H. D. W.

1889

Jan. 15.

ARMSTRONG *v.* GASELEE AND OTHERS.

Practice—Preliminary Acts—"Actions for damage by collision between vessels"—Rules of Supreme Court, 1883, *Order* XIX., *r.* 28.

An action was brought by the owner of a barge and her cargo against the owners of a tug for negligence in towing, in consequence of which, as the plaintiff alleged, the barge came into collision with another vessel, and was lost with her cargo:—

Held, that the action was not one "for damage by collision between vessels" within the meaning of Order XIX., r. 28, and that the parties were not required to file preliminary acts as prescribed by the rule.

CASE referred to the Court by Denman, J., at chambers, on appeal from a decision of the master refusing to make an order at the instance of the defendants for the filing of preliminary acts.

The action was brought by the plaintiff, the owner of the barge *Hesperus* and her cargo, against the defendants, the owners of the tug *Wasp*, to recover damages for negligence in towing, in consequence of which, as the plaintiff alleged, the barge came into collision with another vessel, and was lost with her cargo.

J. P. Aspinall, for the defendants. The decision of the master was erroneous. The action is one in which preliminary acts should be filed under Order XIX., r. 28. (1) The claim of the

(1) By Order XIX., r. 28: "In actions in any Division for damage by collision between vessels, unless the Court or a judge shall otherwise order, the solicitor for the plaintiff shall, within seven days after the commencement of the action, and the solicitor for the defendant shall, within seven days after appearance, and before any pleading is delivered, file with the registrar, master, or other proper officer, as the case may be, a document to be called a preliminary act, which shall be sealed up and shall not be opened until ordered by the Court or a judge, and which shall contain a statement of the following particulars:

(*a.*) The names of the vessels which came into collision and the names of their masters;

(*b.*) The time of the collision;

(*c.*) The place of the collision;

(*d.*) The direction and force of the wind;

(*e.*) The state of the weather;

(*f.*) The state and force of the tide;

(*g.*) The course and speed of the vessel when the other was first seen;

(*h.*) The lights (if any) carried by her;

(*i.*) The distance and bearing of the other vessel when first seen;

(*k.*) The lights (if any) of the

plaintiff is "for damage by collision between vessels" within the terms of the rule, and the rule applies, notwithstanding that the collision which is alleged to have caused the damage is a collision between the plaintiff's vessel and a vessel the owners of which are not parties to the action. Preliminary acts are filed in the Admiralty Registry in similar cases.

Joseph Walton, for the plaintiff. The master was right in refusing to make the order. An action against tug-owners for negligent towage, in consequence of which the vessel towed is alleged to have come into collision with a third vessel, is not "an action for collision between vessels" within Order XIX., r. 28.

The particulars required by the rule shew that it applies only to cases of collision between vessels which are before the Court. This action is analogous to an action brought by a shipowner against a pilot for negligence, or against a harbour authority in respect of defective harbour-lights, in consequence of which it is alleged that the plaintiff's ship has come into collision with another vessel, and in either of these cases it would be useless to order the filing of preliminary acts. [He referred to *The John Boyne*. (1).]

J. P. Aspinall, in reply.

HUDDLESTON, B. I am of opinion that this appeal should be dismissed. The object of preliminary acts in Admiralty practice was explained by Dr. Lushington in *The Vortigern*. (2) The learned judge there said: "Preliminary acts were instituted for two reasons—to get a statement from the parties of the circumstances recenti facto, and to prevent the defendant from shaping his case to meet the facts put forward by the plaintiff." In *The John Boyne* (1), a case in which the owners of a cargo sued the owners of the carrying ship for damage to the cargo owing to a collision between the carrying ship and another vessel, due, as the plaintiffs alleged, to the negligence of the servants of the

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other vessel which were first seen;

(*l.*) Whether any lights of the other vessel, other than those first seen, came into view before the collision;

(*m.*) What measures were taken, and when, to avoid the collision;

(*n.*) The parts of each vessel which first came into contact."

(1) 3 Mar. C. (N.S.) 341.

(2) Swa. 518.

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defendants, Sir Robert Phillimore refused to order preliminary acts to be filed under Order XIX., r. 28, at the instance of the defendants, on the ground that there was no "mutuality," as the plaintiffs could not be expected to know the circumstances of the collision. Sitting recently by consent as a Divisional Court I myself upheld a master's order for preliminary acts made under this rule at the instance of defendants. The appellant in the case before me was the owner of the cargo of a barge, and he was proceeding in the Queen's Bench Division against the owner of a ship in respect of a collision between the barge and that ship. It appeared that there had been cross-actions in the Admiralty Division between the owners of the barge and the owners of the ship arising out of the same collision, and that both vessels had been found to blame. I upheld the master's order on the ground that the circumstances shewed that the plaintiff was in a position to ascertain the particulars required. This is a case of a different character. Here the plaintiff alleges that the damage was occasioned not by a vessel colliding with his vessel, but by a vessel bringing his vessel into collision with a third vessel. It has been argued that such a case is an "action for damage by collision between vessels" within the words of the rule. But it is obvious that the particulars which the rule requires are particulars of rival cases set up on behalf of two ships which have themselves come into collision. The plaintiff might furnish the name of his vessel and that of the third vessel, and might give other formal particulars. But how is he to deal with "the course and speed of the vessel when the other was first seen"? The "other" is the third vessel. The "course and speed of the vessel," i.e., the barge, depend upon the course and speed of the tug. How, again, is he to deal with "the distance and bearing of the other vessel when first seen"? Does this refer to the distance and bearing of the third vessel when first seen from the barge or when first seen from the tug? The plaintiff cannot, any more than the plaintiff in *The John Boyne* (1), be expected to know these matters. The words of the rule are, no doubt, wide, but it is intended to include actions by owners of cargo for damage to cargo arising from collision.

(1) 3 Mar. C. (N.S.) 341.

I think, therefore, that the master was right, and that there should be no order for preliminary acts, but that the costs of this appeal should be costs in the cause.

WILLS, J. I am of the same opinion. The nature of the particulars which the rule requires the parties to give in preliminary acts shews, as it appears to me, that the actions contemplated are, generally speaking, actions in which the question to be decided is, which of two colliding vessels is to blame in respect of a collision. The fact that the question arises in proceedings by owners of cargo and in proceedings under Lord Campbell's Act may account for the use of the comprehensive terms, "actions for damage by collision between vessels." The case to which reference has been made, of an action by the owner of a ship in tow against the owner of the tug for negligence, in consequence of which it is alleged that a collision has taken place between the ship and the tug, is a case in which the very question in dispute is which of the two colliding vessels is in fault. In such a case, therefore, an order for preliminary acts would be within what I conceive to be the general scope of the rule, though the utility of the order might, under the circumstances, be doubtful. I will not say that the rule should be so construed as absolutely to confine its application to this one class of cases. This might be too narrow a construction. But an action by the owner of a ship against the owners of a tug for negligence, in consequence of which it is alleged that a collision has taken place between the ship and another ship which is not before the Court, is not, in my opinion, an action within the general scope of the rule; while, if an order were here made, the parties could only comply with it by filing imperfect preliminary acts, which must of necessity omit some of the most important particulars required by the rule, and which would therefore be of no real service. I therefore think that the master was right in refusing to make the order.

Appeal dismissed; costs to be costs in the cause.

Solicitor for plaintiff: *G. E. Philbrick.*

Solicitors for defendants: *Keen, Marsland & Bryden.*

H. D. W.

1889
Jan. 21.

[IN THE COURT OF APPEAL.]

HARTAS *v.* RIBBONS.

Principal and Agent—Indemnity—Stock Exchange, Usage of—Defaulting Broker.

The defendant employed the plaintiff, a broker on the Stock Exchange, to purchase shares, which he accordingly did. Before the settling-day the plaintiff became a defaulter on the Stock Exchange through inability to meet his engagements, and, in accordance with the rules of the Stock Exchange, the accounts which he had open were closed as between himself and the jobbers at the then current prices as fixed by the official assignee of the Stock Exchange. The account in respect of the shares bought for the defendant when closed, as above mentioned, shewed a balance in favour of the jobbers against the plaintiff. According to the practice of the Stock Exchange such closing of the account does not affect the client if he, nevertheless, desires to have the contract completed, and is not in default to the defaulting broker; and the jobber in that case is bound to complete on the settling-day. The plaintiff, on the same day when he was declared a defaulter and his accounts closed, subsequently informed the defendant that he could either have the contract completed, as above mentioned, or he might accept the official prices. The defendant said that he would do the latter:—

Held, that the defendant, having ratified the closing of the account before the settling-day, was liable to indemnify the plaintiff against the amount for which the plaintiff was liable to the jobbers on such closing.

Duncan v. *Hill* (Law Rep. 8 Exch. 242) distinguished.

Appeal from the judgment of Hawkins, J., at the trial.

The facts were as follows:—The action was brought by the plaintiff, who had been a broker on the London Stock Exchange, against the defendant, who had been his client, for indemnity against certain liabilities incurred by the plaintiff as such broker to the amount of 110*l.* 4*s.* 2*d.* It appeared that the defendant had instructed the plaintiff to purchase for him certain shares on the Stock Exchange. The plaintiff accordingly purchased such shares for September 27. The shares were, by defendant's instructions, afterwards carried over till the next account day, viz., October 14. On October 12 the plaintiff found that, by reason of not receiving expected remittances from clients, he would be unable to meet his engagements. He gave notice on that day that this was so to the secretary of the Stock Exchange, and he was in consequence on the same day

declared a defaulter, and his outstanding accounts were, according to the rules of the Stock Exchange, closed as between himself and the jobbers at the prices then current in the market as fixed by the official assignee of the Stock Exchange. On the transaction in respect of the purchase of shares for the defendant there was, upon such closing of the account, a balance in favour of the jobbers against the plaintiff of 110*l.* 4*s.* 2*d.* Later on the same day the defendant called on the plaintiff and a conversation took place between them, which was in substance to the following effect:—The plaintiff told the defendant that he, the plaintiff, had been declared a defaulter on the Stock Exchange and his accounts closed; that the defendant could either accept the prices fixed by the official assignee, or, if he desired it, he could take the shares up, that is to say, pay for them on the settling-day, or have the account transferred to another broker: and the plaintiff asked him which he would do. The defendant thereupon said that he would accept the official prices. It appeared from evidence given by the official assignee of the Stock Exchange that, according to the practice of the Stock Exchange, the closing of the account as between the defaulting broker and the jobber does not affect the client, if he desires to complete the contract, and is not in default to the defaulting broker; but in that case the jobber is bound to complete the contract with the broker's client, who may himself take up the shares on paying the price to the jobber, or may transfer the account to another broker.

It was admitted that the market price of the shares was practically the same on October 14 as it had been on the 12th.

The learned judge on the above facts gave judgment for the plaintiff for the amount claimed.

McIntyre, for the defendant. The bargain which the plaintiff was employed to make was that the shares should be carried over till the 14th. By reason of the plaintiff's own default the account was closed on the 12th, without any instructions from the defendant. The case of *Duncan* v. *Hill* (1) shews that under those circumstances, the loss not arising from any default of the

(1) Law Rep. 8 Ex. 242.

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client, but from that of the broker himself, there is no implied promise by the client to indemnify the broker against such loss.

[BOWEN, L.J. In that case it would appear that the client did not know of the practice of the Stock Exchange whereby the account could be transferred to another broker. In this case the defendant knew of it and expressly elected to adopt the closing of the bargain at the prices fixed by the official assignee.]

That was after the account had been already closed as between the broker and the jobbers. That view would involve the making of a new agreement between plaintiff and defendant, for which there would be no consideration. The plaintiff incurred no detriment by the defendant's declining to go on with the contract, nor did the defendant receive any benefit.

[FRY, L.J. If the original bargain had stood, the shares might have gone down still further by the settling-day. The defendant escaped the risk of further loss.]

Murphy, Q.C., and *Sidney Woolf*, for the plaintiff, were not called upon to argue.

LORD ESHER, M.R. This case is, in my opinion, clearly distinguishable from *Duncan* v. *Hill*. (1) The plaintiff had been instructed by the defendant to make a bargain for the purchase of shares on the Stock Exchange. It is a term implied in such a case that, if by reason of the principal's not providing funds the broker becomes personally liable to pay the jobber, the principal is bound to indemnify the broker. The plaintiff made a contract in pursuance of his instructions, and, if the transaction had gone on till the 14th, the defendant would have been bound to have paid or put the plaintiff in funds to pay for the shares on that day, and, if he failed to do so, the plaintiff must then have paid for the shares himself, and would have been entitled to an indemnity from the defendant. But on the 12th the plaintiff became a defaulter on the Stock Exchange in respect of transactions independent of this one, and the account was, in pursuance of the rules of the Stock Exchange, closed as between the plaintiff and the jobbers. The defendant might then have

(1) Law Rep. 8 Ex. 242.

rejected the plaintiff as his agent altogether and have himself completed the contract with the jobbers, or have had his account transferred to another broker: and no harm would then have happened to him by reason of the plaintiff's becoming a defaulter. But he did not do so. What is the result? The jobbers would have a claim against the plaintiff in respect of the contract he made as agent for the defendant: the defendant, having the option of throwing over the plaintiff as his agent altogether, did not do so, but did what in substance amounted to an election, notwithstanding the plaintiff's default, to treat the plaintiff as being still his broker in respect of the transaction. Therefore he altered the position of the plaintiff and obtained what, in my opinion, must be deemed a benefit for himself. Whether it is to be considered that there was a new contract or that the old one stood, does not seem to me to make any difference. Having the option of getting rid of the plaintiff as his agent, he elected, with knowledge of all the circumstances, to treat him as still being such agent; and he left him liable, being such agent, to the persons with whom the plaintiff had made the contract according to the rules of the Stock Exchange. And, that being so, he neither put the plaintiff in funds to pay for the shares, nor paid for them himself. Under these circumstances, the case seems to me to fall within the ordinary rule by which a principal is bound to indemnify his agent.

BOWEN, L.J. I am of the same opinion. There was originally an employment of the plaintiff by the defendant as his agent, and consequently an implied promise by the defendant to indemnify the plaintiff against all losses incurred by reason of such employment. The bargain for September 27 was carried over till October 14, but on the 12th the plaintiff became a defaulter on the Stock Exchange, and was rendered subject to loss accordingly, but, so far, any loss he might incur was not due to the action of the defendant, but was the result of his own difficulties. That being so, a loss had been incurred which, if the case had stood there, might have been said, according to the doctrine of *Duncan* v. *Hill* (1), to have been caused by the plaintiff's own default,

(1) Law Rep. 8 Ex. 242.

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Bowen, L.J.

and, therefore, not to be covered by any implied contract to indemnify on the part of the defendant. But the case does not stand there. As soon as the default was pronounced an interview took place, at which the plaintiff in substance told the defendant that he, the plaintiff, had incurred a loss, but the defendant, if he desired it, could have the contract completed; and asked the defendant whether he would have the account still kept open and himself deal with the jobbers, or have the account transferred to other brokers, or would elect to ratify what had been done and close the transaction at the official prices. If he had declined to do the latter, he could have had the original bargain carried out on the 14th, and would then have had to pay the price on that day. He elected to take the matter as it stood, and to ratify what had been done. The effect of that seems to me to be that there was an implied promise to treat the indemnity as covering the loss of October 12. It is suggested that there was not any consideration for such implied promise? I think there was. The defendant got rid of the risk to which he would have been subjected if the account had been kept open. It appears to me that the effect of what took place was that he elected to treat what had been done as done on his behalf, and to ratify his agent's action instead of keeping the account open and carrying out the contract on the account day. But for that fact I think the case might have been within the decision in *Duncan* v. *Hill* (1), but, under the circumstances, I think that case is distinguishable. For these reasons, I am of opinion that the appeal should be dismissed.

FRY, L.J., concurred.

Appeal dismissed.

Solicitor for plaintiff: *Sydney R. Pollard.*
Solicitor for defendant: *A. Pulbrook.*

E. L.

(1) Law Rep. 8 Ex. 242.

[IN THE COURT OF APPEAL.]

1889
Jan. 17.

HUNT *v.* FINEBURG AND ANOTHER.

Practice—Cause set down for Trial—Change of Solicitors—Notice to the Associate—Order VII. *r.* 3.

Where a change of solicitors has taken place after a cause has been set down for trial, it is the duty of the new solicitor to inform the associate of the change, in order that the name of the solicitor responsible for the conduct of the cause may appear on the record.

APPEAL by the plaintiff from an order of the Queen's Bench Division permitting a new trial on the terms that the plaintiff should pay to the defendant all costs thrown away.

The action was brought by the plaintiff against the defendants Fineburg and Bellwood. After the cause had been set down for trial the plaintiff's solicitor was suspended from practice. The plaintiff thereupon changed his solicitor, and notice of such change was filed at the Central Office, but no notice was given at the associate's department of that office. (1) The case came on for trial before Huddleston, B., who, finding the name of a solicitor on the record who had been suspended from practice, and there being no evidence before him of the change of solicitors, declined to hear the case, and dismissed the action with costs. The plaintiff applied to the Divisional Court to reinstate the cause, and the Court (Lord Coleridge, C.J., and Cave, J.) made an order conditional on the plaintiff paying to the defendants all costs thrown away.

The plaintiff in person appealed.

McCall, for the defendant Fineburg.

Herbert Jacobs, for the defendant Bellwood.

(1) Order VII. r. 3: "A party suing or defending by a solicitor shall be at liberty to change his solicitor in any cause or matter without an order for that purpose, upon notice of such change being filed in the Central Office, or in the District Registry, if the cause or matter is proceeding therein; but until such notice is filed and a copy thereof served, and (in causes or matters pending in the Chancery Division) left in the chambers of the judge to whom the cause or matter is assigned, the former solicitor shall be considered the solicitor of the party."

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LORD ESHER, M.R. In this case an action was brought by the plaintiff, it signifies not for what. The case was in the list before Baron Huddleston, and when it was called on the learned judge was informed that the name of the solicitor for the plaintiff in the action was that of a person who had no right so to appear. He called for the nisi prius record, and, on looking at that, he found the name of the plaintiff's solicitor was that of a person who had been suspended from practice, and he said under those circumstances he would not hear the case. He was then told that there had been a change of solicitors, and that the new solicitor was under no disability. He said that he must be satisfied of that, and waited some time. He then said he would wait no longer, and the defendants' counsel claimed judgment, and as it appeared to the learned judge that the defendants were present by counsel, but that the plaintiff was not properly represented, he dismissed the action with costs. In point of fact, at that time there had been a change of solicitors, as the case had been taken out of the hands of the solicitor who had been suspended. That in itself would not be sufficient, but it was also true that notice of the change had been filed in the Central Office, and given to the solicitor on the other side. No notice, had, however, been given to the associate, and he had not changed the name on the nisi prius record, as he would have done had he been told. The case went before the Divisional Court on an application by the plaintiff to restore the case, and this was granted; but on considering the whole matter, the Court imposed the term that this should only be done on payment by the plaintiff of all costs thrown away. That decision comes before us on appeal, and it was urged that everything required by Order VII. r. 3, had been done to make the change effective, and that the case ought to have been restored without any terms. The first point was whether the solicitor had been effectively changed. It is said that that had not been done because of the want of notice to the associate, but we are of opinion that such notice is not necessary to make the change effective. But then comes the question whether there was not something else to be done, dependent not on the rules, but on the general duty of the solicitor having the conduct of the cause, as a step in the action. There

are many things which the solicitor is bound to do, such as to see that the witnesses are present, to examine the cause list to see if the cause is in it, and other matters. Now, before this order and rule were made there had been a practice that, on a change of solicitors, notice should be given to the associate who was the real solicitor, to whom in old days the nisi prius record would have been given. Since the rule also the practice has been to give such notice in order that the judge before whom the case is tried may know who is responsible. The rule and order were not made on this account, but to facilitate the change of solicitors by getting rid of certain preliminaries to a change, and the rule does not deal with any step after this change, or any general duty of the solicitor arising from his character as solicitor. One of these general duties is that, for the effective trial of the cause, notice should be given to the associate of the name of the solicitor actually conducting the cause, that it may be put on the record. It is not necessary to decide what the judge might do under such circumstances as the present, and whether if counsel was instructed by the new solicitor judgment could still be given for the defendant, or whether the cause should be struck out, because this is an appeal from the order of the Divisional Court restoring the cause on terms, and as we agree with the order appealed from any question as to what they have done as to costs is a matter which, after that decision of ours, we cannot entertain.

BOWEN, L.J. I am of the same opinion.

FRY, L.J. I am of the same opinion, and I have only one observation to make. A solicitor is the officer of the Court, and it is necessary that the judge should know who is the officer of the Court who is responsible for the conduct of the cause. It is the duty of the solicitor in the action to do everything necessary to give the judge that information. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for the plaintiff: *F. A. Whitmore Lowe.*

Solicitors for the defendants: *Kaye & Guedalla*, and *J. & W. Maude.*

A. M.

1889
Jan. 16.

STRAKER BROTHERS & Co. *v.* REYNOLDS AND ANOTHER.

Practice—Production of Documents—Documents in the Hands of Persons not Parties to Action—Rules of Supreme Court, 1883, *Order* XXXVII., *r.* 7.

The plaintiffs in an action applied under Order XXXVII., r 7, for an order for leave to inspect the books of persons who were not parties to the action, and for the production of such books at the office of the plaintiffs' solicitor:—

Held, that the Court had, under Order XXXVII., r. 7, no jurisdiction to make the order.

APPEAL from a decision of Denman, J., at chambers, in an issue as to the validity of an award made under the Metropolitan Building Act, 1855, between the plaintiffs, building owners, and the defendants, adjoining owners, in which the plaintiffs contended that the surveyors had allowed as against them the expense of repairs really done under covenants in the defendants' lease. The plaintiffs applied to a master under Order XXXVII., r. 7, "for liberty to inspect the books" of certain contractors who, as they alleged, had done the repairs in question, "and for the production of such books at the office of the plaintiffs' solicitor." The master refused to make the order and Denman, J., confirmed his decision.

Jelf, Q.C., and *R. M. Bray*, for the plaintiffs. The plaintiffs are entitled to the order. The contractors could be subpœnaed to produce the books at the trial. They may, therefore, under Order XXXVII. r. 7 (1), be ordered to produce the books for inspection before the trial.

[HUDDLESTON, B. The order applied for is one for inspection of documents, as if between the parties to the action. Such an order is not within the terms of Order XXXVII., r. 7.]

The form of the summons might be amended. In *Central News Company* v. *Eastern Telegraph Company* (2) such an order is

(1) By Order XXXVII., r. 7: "The Court or a judge may in any cause or matter at any stage of the proceedings order the attendance of any person for the purpose of producing any writings or other documents named in the order, which the Court or judge may think fit to be produced: Provided that no person shall be compelled to produce under any such order any writing or other document which he could not be compelled to produce at the hearing or trial."

(2) 53 L. J. (Q.B.D.) 236.

treated by Lord Coleridge, C.J., as within the rule, and such an order would appear to have been made by a Divisional Court in *Rishdon* v. *White* (1).

Bartley Denniss, and *H. Fraser*, for the contractors, and *W. B. Odgers*, for the defendants, were not heard.

HUDDLESTON, B. I am of opinion that this appeal should be dismissed. The jurisdiction of the Court or judge is defined by Order XXXVII., r. 7. That rule relates to documents which are not in the possession of the parties to the proceeding, and gives power to the Court or judge "to order the attendance of any person for the purpose of producing any writings or documents named in the order which the Court or judge may think fit to be produced." An application by the plaintiff to the judge at chambers to order the "attendance" of these contractors "for the purpose of producing" their books would have been within the terms of rule 7, and if this had been an application of that character the propriety of granting it might have been considered. The contractors might perhaps under the rule have been ordered to attend with their books, in order that it might be ascertained whether the books contained entries relevant to the matters in dispute. This, however, is an application for "liberty to inspect the books of" the contractors, "and for the production of such books at the office of the plaintiffs' solicitor." Such an application is not, in my opinion, within the rule, and it is clear that we cannot on appeal alter the terms of the summons on which the judge gave the decision which is appealed against. We have been referred to *Rishdon* v. *White* (1), but in that case the question of jurisdiction does not appear to have been considered. The Divisional Court assumed, but did not decide, that there was power under the rule to make an order for the inspection of documents in the possession of third persons.

WILLS, J. I am of the same opinion. The order applied for was one which, as it appears to me, the judge at chambers had no jurisdiction to make under rule 7 of Order XXXVII., and I certainly do not think that, in dealing with the appeal, the Court

(1) 5 Times Rep. 59.

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ought to allow an amendment in the form of the summons on which the judge gave his decision.

Rule 7 of Order XXXVII. is one of a group of rules which regulate the practice as to the preliminary examination of witnesses before the trial. This practice had been previously regulated by ss. 46 and 47 of the Common Law Procedure Act of 1854, and, prior to the passing of that Act, by ss. 4 and 5 of 1 Wm. 4, c. 22. The effect of rule 7 is, in my opinion, to render documents in the possession of witnesses examined before the trial liable to production in the same manner as documents in the possession of witnesses called at the trial. It is said that rule 7 has the further effect of rendering such documents, documents which are in the hands of third persons, open to inspection, for it is inspection which is here really applied for, just as if they were documents in the hands of the opposite party in the action. And certainly in *Central News Company* v. *Eastern Telegraph Company* (1), though the Divisional Court there refused to make an order for the inspection of documents in the possession of third persons, Lord Coleridge, C.J., does seem to have expressed an opinion that the Court had power to grant the application under the rule. He, however, while expressing this opinion, pointed out the necessity for extreme caution in the exercise of the jurisdiction, assuming it to exist. We have also been referred to *Rishdon* v. *White* (2), a case only reported in a series of reports republished from a newspaper. A Divisional Court does appear there to have made an order under rule 7 for the inspection before the trial of documents in the hands of a firm of wharfingers who were not parties to the action. But I have learned from experience, as regards my own judgments, that the reports of decisions thus republished are not always accurate. I cannot, therefore, accept the case as an authority which precludes another Divisional Court from considering the question of the jurisdiction conferred by the rule. There indeed the third persons against whom the order was made were wharfingers, persons engaged in an occupation of a quasi public nature, and perhaps in such a case such an order might be made consistently with the caution the necessity for the exercise of which Lord

(1) 53 L. J. (Q.B.D.) 236. (2) 5 Times Rep. 59.

Coleridge, C.J., pointed out in his observations in *Central News Company* v. *Eastern Telegraph Company*. (1) But I do not gather from the report of *Rishdon* v. *White* (2) that the attention of the Divisional Court was there directed to the difficulty arising on the construction of rule 7. In my opinion the rule was intended by those who framed it to be strictly construed, and I think that it gives the Court or a judge power to order the production of documents for the purpose of the preliminary examination of witnesses before the trial, but does not give the Court or a judge power to order inspection, properly so called, before the trial, of documents in the hands of persons who are not parties to the action. Had the intention been to render documents in the hands of third persons liable to inspection, properly so called, before the trial, the rule would have contained express words to that effect. The application of the plaintiffs was therefore wrong both in form and in substance, and was properly refused under the rule.

Appeal dismissed.

Solicitor for the plaintiffs: *J. W. Sykes.*

Solicitors for the contractors and the defendants: *Warburton & De Paula.*

H. D. W.

RUMLEY *v.* WINN.

Jan. 22.

Practice—Time—Delivery of Pleadings—Counter-claim—Reply—Orders XIX., *r.* 2; XXI., *r.* 6; XXIII., *rr.* 1, 4.

Where a counter-claim is pleaded with a defence, the plaintiff has twenty-one days within which to deliver his reply to the defence and counter-claim.

MOTION to enter judgment for the defendant on the plaintiff's default in delivering a reply to the defendant's counter-claim.

The writ was specially indorsed, under Order III., r. 6, with a statement of the plaintiff's claim, which was for rent.

On November 27, 1888, the defendant delivered his defence with a counter-claim for damages for an illegal distress and trespass.

On December 14 the defendant gave notice of this motion to

(1) 53 L. J. (Q.B.D.) 236. (2) 5 Times Rep. 59.

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the plaintiff, who, on December 18, delivered his reply to the defence and counter-claim.

Hextall, for the defendant. The plaintiff's reply, being a defence to the counter-claim, ought to have been delivered within ten days. (1) By Order XXI., r. 6: "Where a statement of claim is delivered to a defendant, he shall deliver his defence within ten days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless such time is extended," &c.; and by Order XXIII., r. 4: "Where a counter-claim is pleaded, a reply thereto shall be subject to the rules applicable to statements of defence." The question then is whether, when the reply raises a defence to the counter-claim, the plaintiff has ten days within which to deliver it, under Order XXI., r. 6, or twenty-one days within Order XXIII., r. 1. (2) It is submitted that the rules provide the longer period of twenty-one days within which to deliver the reply, where the reply is intended to be the final pleading, but that where the reply is also a defence to the counter-claim, which defence will require a further answer from the defendant, the provisions of Order XXI., r. 6, apply, and the defence to the counter-claim must be delivered within ten days from the delivery of the counter-claim. It is admitted that, the reply having been delivered since notice of this motion was given, the defendant is not entitled to judgment, but the plaintiff was in default when the notice of motion was given, and the defendant ought, therefore, to have the costs of the motion. It is submitted that this motion for judgment is properly made in this Court: Order XXVII., r. 11; Order XL., r. 1; *Higgins* v. *Scott*. (3)

[He also referred to Orders XIX., r. 3; XXI., rr. 4, 10; XXIII., r. 2; XXIV., r. 1.]

(1) Order XIX., r. 2, provides that a defendant shall deliver his defence, set-off, or counter-claim, subject to the provisions of Order XXI., and at such time and in such manner as therein prescribed; and the plaintiff shall, subject to the provisions of Order XXIII., and at such time and manner as therein prescribed, deliver his reply to such defence, set-off, or counter-claim.

(2) Order XXIII., r. 1, provides that the plaintiff shall deliver his reply (in actions other than Admiralty actions) within twenty-one days after the delivery of the defence.

(3) 21 Q. B. D. 10.

Scrutton, for the plaintiff, was not heard.

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DENMAN, J. The question upon which this case turns is thus stated, by way of query, in the current volume of the Annual Practice:—"Is a reply to a counter-claim to be delivered like a defence, within ten days (Order XXI., r. 6), or like a reply, within twenty-one days (Order XXIII., r. 1)? A practice master has decided (*Burkhardt* v. *Thurm*, cited Order XXVII., r. 2) that three weeks is the time within which a reply is to be delivered," &c. I agree with the view said to have been taken by the master. The rules are somewhat conflicting. They cannot be applied in their integrity to every case. They provide, in effect, that the reply to a counter-claim shall be subject to the rules applicable to statements of defence. They also provide that a reply shall be delivered within twenty-one days. The question is, which limit of time applies where the reply is an answer both to the defence and to the counter-claim. I am of opinion that where a counter-claim has been pleaded, and the reply is an answer to the counter-claim as well as to the defence pleaded to the claim, the plaintiff has twenty-one days within which to deliver the reply. I think, in considering which of the two rights in respect of time given by the rules should be applied, we ought to act on the principle that a man should not, unless the Court is compelled to that construction, be deprived of any right, and we ought to hold, therefore, in this case that he is entitled to the larger right of the two. The application of that principle will not, I think, work any injustice. I take it that the main object of allowing a plaintiff twenty-one days for his reply was to give him a reasonable time in which he might consider the defence, and make up his mind what his next step should be—whether he should take out the money paid into Court, if any has been paid in, or what is his position in view of the defence which has been placed upon the record. There would seem to be not less but more reason for allowing him time for consideration when there is a counter-claim as well as a defence, because the plaintiff has more to consider and to answer. Whether that be so or not, the ground of my decision is, not that the rules necessarily contemplated either that the one time or the other should apply to

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a case like this, but that the suitor ought not to be deprived of the larger right given by them. I think, therefore, that the present application fails. I must add that this case should not be taken as a precedent in favour of making such applications to this Court in the first instance. I think it doubtful whether the application should not be made at chambers, though no doubt this Court has power to entertain it.

STEPHEN, J. I agree that this motion should be dismissed. As soon as the question is fairly stated, it answers itself. If no counter-claim is pleaded, the rules give the plaintiff twenty-one days within which to reply to the defence, and ten days within which to reply to a counter-claim, if pleaded. I think it is clear that when the reply is an answer both to the defence and counter-claim, the plaintiff has the larger time within which to deliver it.

Motion dismissed.

Solicitors for plaintiff: *J. & R. Gole.*

Solicitors for defendant: *Clinton & Buckley.*

W. A.

Jan. 15.

[IN THE COURT OF APPEAL.]

RICHARDSON *v.* HARRIS.

Bill of Sale—Consideration, Statement of—Money paid—Accruing Liability, Retention of Money to satisfy—Expenses—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

The consideration for a bill of sale was stated to be the payment of a sum of money by the grantee to the grantor. Part only of such sum was in fact paid over, the remainder being retained by the grantee by agreement with the grantor in satisfaction of (1) the amounts of acceptances which had been given by the grantor to the grantee, and were then running; (2) a sum agreed to be paid by the grantor to the grantee for the hire of furniture assigned by the bill of sale for a period of three months; and (3) an agreed sum for expenses of the transaction:—

Held, that none of the amounts so retained could truly be said to have been paid to the grantor, and therefore the consideration was not truly stated, and the bill of sale was void.

Ex parte National Mercantile Bank (15 Ch. D. 42) discussed.

APPEAL from the judgment of Mathew, J., at the trial of an interpleader issue. The issue was with regard to the title to

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certain furniture taken in execution, but which was claimed by the plaintiff as assignee thereof under a bill of sale as against the defendant, the execution creditor.

The facts were as follows:—The bill of sale was an absolute assignment of the furniture in question by way of sale, and the circumstances under which it was executed were these. It appeared that one Hamilton, the execution debtor, had given acceptances to the plaintiff in consideration of advances for two sums of 80*l.* and 40*l.*, which fell due respectively on January 6 and 17, 1888. He went on January 6 to the plaintiff with a post-dated cheque for 95*l.*, drawn by his wife (who had money of her own) and indorsed by himself, payable on January 23, and requested the plaintiff to renew the bills for three months and discount the cheque. The plaintiff arranged to do so in the following manner: in lieu of the 80*l.* bill a fresh bill for 70*l.* at three months was given, 10*l.* being retained by the plaintiff out of the amount of the cheque. A sum of 7*l.* was also retained by the plaintiff out of the amount of the cheque for that accommodation. The 40*l.* bill was renewed for three months, 4*l.* being retained by the plaintiff out of the amount of the cheque in respect of that accommodation; a further sum of 2*l.* 10*s.* was retained out of the amount of the cheque in respect of interest till maturity of the cheque; and the balance of the amount of the cheque, viz., £71 10*s.*, was paid by the plaintiff to Hamilton upon the cheque. On January 12 Hamilton came to the plaintiff and said that he wanted to sell the furniture in his house in London, but desired that when sold it should remain in the house till he could dispose of the lease. On the next day the parties met again, and the plaintiff, who had in the meantime inspected the furniture, said that he should be willing to give 500*l.* for it, and to leave it in the house for three months; that he should charge 25*l.* for so leaving it; and that, as an inventory of the furniture would be necessary, he should charge 13*l.* for the expense of making such inventory and other expenses of the assignment, and that those sums, together with the amount of the outstanding bills and cheque, must be deducted from the 500*l.*, the price of the goods. Hamilton subsequently assented to these terms.

A bill of sale, by which Hamilton assigned the furniture to the

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plaintiff, was executed on January 17. The plaintiff only paid in cash the balance of the purchase-money after deducting therefrom the amount of the acceptances for 70*l.* and 40*l.*, and the wife's cheque for 95*l.*, and the two sums of 25*l.* and 13*l.* above mentioned. The assignment of the furniture recited that an agreement had been made for the absolute sale of the furniture by the assignor to the assignee, and was expressed to be made in consideration of the sum of 500*l.* paid by the assignee to the assignor on or immediately before the execution of the assignment. It was contended for the defendant that the assignment of the furniture was bad by virtue of the provisions of the 8th section of the Bills of Sale Act, 1878 (1), inasmuch as the consideration was not truly stated.

Mathew, J., so held, and accordingly gave judgment for the defendant.

Gainsford Bruce, Q.C., and *H. Tindal Atkinson*, for the plaintiff. The cases of *Ex parte National Mercantile Bank* (2) and *Ex parte Challinor* (3) are authorities to shew that the statement of the consideration in this case is sufficiently accurate. It is clear on the authorities that, where part of the consideration money is, with the consent of the grantor, retained in discharge of an existing debt or liability, it may be described as paid to the grantor. It is not necessary to go through the ceremony of handing the money over and handing it back again.

[LORD ESHER, M.R. That may be so in cases where there is a retention for a debt due at the time. Here the retention was in respect of bills and other matters not yet due.]

In *Ex parte National Mercantile Bank* (2) the notes and bill of exchange were not due.

[LORD ESHER, M.R. It seems to have been assumed in that case, as a matter of fact, that the amounts were already due; and, moreover, the whole of the consideration money was actually paid over to the grantor of the bill of sale.]

The principle seems to be that, if money is retained in pay-

(1) It should be observed that the bill of sale not being by way of security the Bills of Sale Act, 1882, did not apply.

(2) 15 Ch. D. 42.

(3) 16 Ch. D. 260.

ment of a cross-demand, it may be said, according to the ordinary legal and mercantile view of the effect of the transaction, to be paid. It is contended that a bill may be paid by the acceptor before maturity. The acceptor might tender the amount of a bill before maturity, and it could be pleaded as a good tender. It was competent to the parties to agree that the sums accruing due on the bills and cheque should become due at an earlier date, and they had so agreed in this case previously to the execution of the bill of sale. Similarly the sums of 25*l.* and 13*l.* for the hire of the furniture and expenses were, by previous agreement between the parties, to become due and payable by the assignor to the assignee at the time of the execution of the bill of sale. They were, therefore, existing debts within the before mentioned principle. All that is necessary is to shew that the full benefit of the £500 passed to the grantor. No doubt if the grantee of a bill of sale deducts anything by way of discount, or bonus, or commission, he does not, in fact, advance the sum stated; but, if there are liabilities attaching to the grantor, whether due at the time or falling due afterwards, and the parties agree, either by the contract itself or by any previous agreement, that the consideration money shall be applied in discharge of such liabilities, and it is so applied, then there is the substantial equivalent of payment of such money. In ordinary business parlance there would be said to have been a payment of such money. The decisions in *Ex parte Firth* (1); *Hamilton* v. *Chaine* (2), and *Ex parte Rolph* (3), depend on the fact that there was no previous agreement in those cases by the grantor that the expenses, &c., should become due, and be deducted from the consideration money.

Cooper Willis, Q.C., and *Cyril Dodd*, for the defendant, were not called upon.

LORD ESHER, M.R. The question is whether the consideration is truly stated in this bill of sale. It has been laid down that the facts need not be stated with the strictest accuracy, but it is sufficient if they are accurately stated either as to their legal effect

(1) 19 Ch. D. 419. (2) 7 Q. B. D. 1, 319.
(3) 19 Ch. D. 98.

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or as to their mercantile and business effect. The question, therefore, in this case, is whether the consideration is sufficiently stated within that rule. The consideration is stated to be 500*l.* paid by the assignee to the assignor on or immediately before the execution of the bill of sale. The meaning of that statement primâ facie is, that the sum of 500*l.* was actually paid, which clearly was not the case. If the sum in question had been actually paid over to the assignor without any binding undertaking by him to pay any part of it back, as appears to have been the case in *Ex parte National Mercantile Bank* (1), I think the consideration would have been in strictness accurately stated, although the assignor had chosen voluntarily to pay part of it back again in respect of some debt either due or becoming payable in the future. In this case the sum of 500*l.* was not actually paid, so it becomes necessary to consider whether the facts are stated with sufficient accuracy according to their legal effect or according to their mercantile or business effect. It has been argued that the facts are truly stated according to their legal effect, because the amount retained must be considered as money paid and paid back in respect of debts. It was said in support of that argument that payment in respect of a debt accruing but not yet due, is, legally speaking, payment of the debt, and this proposition was illustrated by the suggestion that a tender of the money before a debt is due would be a good tender. Similarly, it was said that, if a bill were falling due at three months, the acceptor would be entitled to go to the holder and pay him before the expiration of the three months, and that there would then have been in law a payment of the bill. I do not think that these contentions are correct, and, therefore, I do not think that the real transaction was stated according to its legal effect. Then was it stated according to its mercantile or business effect? That would depend on the mode in which mercantile or business men would regard such a transaction. No doubt where two persons are mutually indebted the one to the other in different amounts, any mercantile or business man, and, therefore, any court of law, would consider it futile to go through the useless ceremony of handing over money in order that it may be handed back again;

(1) 15 Ch. D. 42.

and, therefore, it may be that, if, instead of the one indebted in the larger amount paying over the whole amount and the other handing back a part of it, the parties agree that the balance only shall be paid, there is what is the equivalent of a payment of the full amount. No court, however, has ever applied this doctrine in such cases unless there was, irrespective of the bargain under which the payment of the consideration took place, a debt already due from the grantor of the bill of sale to the grantee. No court has ever said that, if a person makes an agreement that he will advance 500*l.*, but that out of that sum of 500*l.* he shall be entitled to deduct 50*l.*, the payment by the lender under such agreement of 450*l.* can be considered as payment by one party of 500*l.* and a payment back again by the other of 50*l.* To make the doctrine above-mentioned applicable there must, in my opinion, be a debt due and payable irrespective of the agreement for payment of the money which is the matter of discussion. It may be that in that case the parties need not go through the ceremony of the one handing over the full sum and the other handing back a part of it, but on payment of the balance there is the equivalent of payment of the full amount on both sides. It has been held that in such a case the facts will support a plea of payment. This is the only doctrine that was laid down by Lord Selborne, L.C., and myself in *Credit Co.* v. *Pott* (1), a case which was afterwards acted upon and admitted by the Court of Appeal to state the correct rule on this subject in *Ex parte Johnson.* (2) It was there held that it is sufficient if the statement of the consideration is substantially accurate, if its true legal effect or its true business effect is stated. The only question here is whether the facts of this case bring it within that rule. I do not think that they do. There was no debt here due and payable by the grantor irrespective of the contract by virtue of which the 500*l.* was to be paid. There was nothing actually payable by the assignor prior to the bill of sale on either of the acceptances or in respect of the indorsement of his wife's cheque. There was nothing due, otherwise than by the agreement by and under which the 500*l.* was payable, in respect of the amount of 25*l.* which was to become payable for the hire of the furniture, or of the amount of 13*l.* for the inventory and other expenses. For

(1) 6 Q. B. D. 295. (2) 26 Ch. D. 338.

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these reasons I think the consideration was not truly stated, and this appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. The question really is whether the facts in this case shew that there was on or immediately before the execution of the bill of sale a payment of 500*l.* to the assignor by the assignee. The Bills of Sale Act, 1878, provides that the consideration must be set forth, which, as might have been expected, has been held to mean truly set forth. The question therefore is, what is "truly" setting forth the consideration. One cannot get much further on the path of definition, when one is face to face with the question what is truth, but one may perhaps go so far as to say that the truth is stated when the statement is sufficiently accurate to enable those who have to act upon or deal with the bill of sale to arrive at an accurate conclusion as to what really took place. Here we have to ask ourselves whether there was a payment of 500*l.* by the assignee to the assignor. Applying the rule as laid down in *Credit Co.* v. *Pott* (1), and afterwards in *Ex parte Johnson* (2), we must look not to the mere form but to the real effect of the transaction. Was there, then, in this case what, according to the ordinary understanding of persons acquainted with business, was equivalent to a payment of 500*l.*? It is really a question of fact. If the assignee had paid a sum to some third person indicated by the assignor, that would be money paid at his request, and might, according to the ordinary understanding of business men, be the same as money paid to the assignor. Here there is no question of the payment of money to a third person. The question here is whether money retained by the assignee can be said to be money paid to the assignor. It obviously would not be sufficient that the money should be merely retained at the request of the assignor. If it were so, then a statement that money was paid would be quite illusory. The retention must surely be under such circumstances as to amount to the same thing as payment. Therefore, in the first place, there must be something to pay. The amount must be retained to meet something which otherwise ought to be met by payment. One can understand that there is something to pay,

(1) 6 Q. B. D. 295. (2) 26 Ch. D. 338.

if there is a debt due and payable. It may be, though I do not say that it is so, that there might under certain circumstances be something to pay if a debt were due, though not payable. It is not, I think, necessary to decide that question. But, if there is no debt either due or payable, how can it be said that there is anything that can be paid? It was argued that the extinction of accruing liabilities of the assignor by the appropriation of moneys by the assignee to meet them, was payment in the business sense of the term. In dealing with this question I think it is necessary to distinguish between the case of bills given in conditional payment of an existing debt due, for the amount of which they are drawn, and the case where the bills are not so given, but the liability to pay is dependent upon the bills themselves. In the case where A. already owes B. 100*l.* and gives a bill at three months for the amount, there is originally a debt due of 100*l.*; then on the giving of the bill the debt is suspended till the bill matures, but, if at maturity the bill is dishonoured, the original debt revives. In that case there is an existing debt due when the bill is given, which continues to exist though in a state of suspension during the currency of the bill. It is a different case where there is no existing debt due to the amount for which the bill is given, and where the liability depends on the bill itself, and nothing is due until the bill matures. It is clearly impossible in that case to say that there is any debt due at the time when the bill is given, and it is only on maturity of the bill that any debt accrues due. I do not think that there is any authority in English law for the proposition that the acceptor of a bill may tender the amount before the bill is due, and that such tender operates as a discharge of the bill. The only payment that can discharge the bill is a payment at or after maturity. If a payment is previously made, it is really a purchase of the bill and does not operate as payment properly so called, though it operates to put an end to the liability between the parties. In this case the bills did not represent any existing debts due at the time when they were given; the liability to pay the amounts depended on the bills themselves, and there were no debts due till they matured. The bills themselves could not be paid until they matured, and there were no pre-existing debts due to the same amount. I do not think that

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the retention of money to meet future liabilities which are not debts due or payable can be said in any business sense to be payment of money. The transaction is a release of the liability in consideration of the money being retained. No ordinary business man ought to describe this transaction as payment of 500*l.* by the assignee to the assignor. For these reasons I agree that the appeal should be dismissed.

FRY, L.J. I arrive at the same conclusion. The question is whether the consideration is stated truly, i.e. with substantial accuracy having regard to the real facts. I think that this question must be answered with reference to the ordinary acceptation of the words used in the English language. Adopting that as the principle of interpretation, I am of opinion that the language used in this bill of sale does not express the real transaction with substantial accuracy. I entirely accept with regard to this matter the view taken by my brother Bowen. In satisfying the bills then current, the money was not applied in payment of an existing debt then due, for the liability was not then mature; it was applied in satisfaction by anticipation of the liability created by the bills. The result is that there is no true statement of what actually took place. There is only one other observation which I wish to make. In substance there was in this case, by a circuitous operation, a bonus taken by the assign which does not appear on the statement of the consideration. Moneys were retained to the amount of the bills then running, and the bills were thus paid by anticipation. The difference between the dates at which they would have matured and at which the amounts were actually retained represents a bonus to the assign. It is admitted that, according to the decisions, if there is anything by way of bonus or commission taken or deducted from the sum purporting to be advanced, and this does not appear, the consideration is not truly stated. It appears to me that that principle is applicable in this case.

Appeal dismissed.

Solicitors for petitioner: *Crawford & Chester.*
Solicitor for defendants: *Edward Lee.*

E. L.

IN RE HUGGINS. EX PARTE HUGGINS. 1889

Jan. 29.

Bankruptcy—Order of Discharge, Suspension of—Conditional Order—Cumulative Penalties—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-s.* 2.

Upon the application of a bankrupt for an order of discharge the Court may, under s. 28, sub-s. 2, of the Bankruptcy Act, 1883, either suspend the operation of the order in point of time, or grant it subject to any of the conditions authorized by the section, but it has no power to make the order of discharge conditional and also to suspend its operation.

APPEAL from an order made by the judge of the Croydon County Court sitting in bankruptcy.

The appellant was adjudicated a bankrupt in March, 1888, and upon his application for his discharge the official receiver reported that he had omitted to keep the usual and proper books of account, that he had continued to trade after knowing himself to be insolvent, and that he had contracted debts proveable in the bankruptcy without any reasonable ground of expectation of being able to pay them. The county court judge, on July 3, 1888, made an order that the bankrupt's discharge be suspended for six months, and that he be discharged as and from January 3, 1889, subject to his consenting to judgment being entered against him in favour of the trustee for the time being of his estate for the balance of his unsecured debts proveable under the bankruptcy. The bankrupt appealed.

Sidney Woolf, and *Broxholm*, for the bankrupt. The order is bad. Under s. 28, sub-s. 2 (1), the judge may, if he does not grant an absolute order of discharge, do one of three things; he may refuse it altogether, or he may suspend its operation for a specified time, or he may grant it subject to conditions; but he has no power to suspend its operation in point of time, and also to make its operation conditional. The question whether the

(1) By s. 28, sub-s. 2, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52): "On the hearing of the application the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property. . . ."

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Court had such a power arose under a very similar section of the Bankruptcy Act, 1861, and it was held that the Court could only inflict on a bankrupt one of the penalties specified in s. 159 of that Act: *In re Marks.* (1)

Muir McKenzie, for the official receiver. The section does not say that only an absolute order of discharge may be suspended; it is capable of meaning that the Court may suspend the operation of a conditional order.

CAVE, J. Upon the actual language of this section the only conclusion that I can come to is that the Court cannot make a conditional order of discharge and also suspend its operation. There is no reason indeed why the legislature should not have given such a power, nor is there any reason why it should have done so, and we have no guide at all to help us in construing the section except the bare grammatical meaning of the passage, but, looking at the passage as it stands, and remembering that it is a quasi-penal enactment, and that therefore we ought to be satisfied, when it tells against the bankrupt, that the legislature intended it to do so, it seems clear that the legislature has not expressed its intention that the judge shall have the power which he has assumed to exercise in the present case. The grammatical meaning of the language used is that he may grant an absolute order of discharge, or he may suspend the order of discharge for a certain time, or he may grant it subject to conditions. In order to justify the order of the county court judge, we should have to read the word "or" as it is frequently printed in charter-parties, "$\frac{\text{and}}{\text{or}}$," so that "or" might be read as "and," but I do not think that we are at liberty, without very good grounds, to make such a change.

I am therefore of opinion that the appellant is entitled to succeed, and that the order should be set aside, and the case remitted to the learned county court judge with this expression of our opinion, so that he may pass what he deems to be the proper sentence under the circumstances. Of course, having now to pass sentence, he will be at liberty to take into consideration all that has happened, including the fact that the order of

(1) Law Rep. 1 Ch. 334.

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discharge has been suspended for a certain time, and if he thinks he ought to modify the conditions on that account, it will be in his power so to order; if he thinks he ought not to modify the conditions, he will act accordingly.

There will be no costs of this appeal, as the official receiver is here only in his official capacity.

CHARLES, J. I am of the same opinion.

Appeal allowed without costs.

Solicitors for bankrupt: *Aird & Hood.*

Solicitor for official receiver: *Solicitor to Board of Trade.*

W. J. B.

1888 *Dec.* 11.

IN THE MATTER OF THE DUTY ON THE ESTATE OF THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Revenue—Customs and Inland Revenue Act, 1885 (48 & 49 *Vict. c.* 51), *ss.* 11, 15—*Associations established for Trade or Business—Duty—Exemptions—Liability to render an Account.*

A body corporate or unincorporate "established for any trade or business" within the meaning of the Customs and Inland Revenue Act, 1885, s. 11, sub-s. 5, is not bound to deliver any account of its property under s. 15.

In 1870 the Council of "The Law Reports" were incorporated under the provisions of the Companies Act, 1867, obtaining a licence under s. 23 to be registered as a limited company without the addition of the word "limited." The association was established for the objects of preparing and publishing, under gratuitous professional control, reports of judicial decisions; of issuing digests and other publications relating to legal subjects, including the statutes; of continuing the series of reports then called "The Law Reports"; of acquiring the copyright of any other reports, and of doing any other things incidental or conducive to those objects. In carrying them out the association employed editors, reporters, printers, and publishers, and prepared, printed, and published reports and other legal publications, and supplied them to subscribers and others for payment. By the memorandum of association all the property and income of the association were applicable solely to the promotion of the above objects, and no part thereof could be paid as dividend, bonus, or otherwise, to any member:—

Held, that the association was established for a trade or business within the meaning of sub-s. 5 of s. 11 of the Customs and Inland Revenue Act, 1885, and was therefore entitled to exemption from the duty imposed by that section.

WRIT OF SUMMONS by the Crown, directed to the secretary of the Incorporated Council of Law Reporting for England and Wales, and claiming delivery of an account, pursuant to the

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Customs and Inland Revenue Act, 1885 (1), of all property belonging to or vested in the Council, and of the gross annual value, income, or profits of such property, and of all deductions claimed in respect thereof, whether as necessary outgoings or under the exemptions allowed by the Act, and claiming also payment of the duty chargeable on such property.

(1) Sect. 11: "Whereas certain property, by reason of the same belonging to or being vested in bodies corporate or unincorporate, escapes liability to probate, legacy, or succession duties, and it is expedient to impose a duty thereon by way of compensation to the revenue: Be it therefore enacted, that there shall be levied and paid to her Majesty in respect of all real and personal property which shall have belonged to or been vested in any body corporate or unincorporate during the yearly period ending on the fifth day of April, one thousand eight hundred and eighty-five, or during any subsequent yearly period ending on the same day in any year, a duty at the rate of five pounds per centum upon the annual value, income, or profits of such property accrued to such body corporate or unincorporate in the same yearly period, after deducting therefrom all necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of such property.

"Subject to exemption from such duty in favour of property of the descriptions following (that is to say)—

"(4.) Property of any friendly society or savings bank established according to Act of Parliament.

"(5.) Property belonging to or constituting the capital of a body corporate or unincorporate established for any trade or business, or being the property of a body whose capital stock is so divided and held as to be liable to be charged to legacy duty or succession duty."

Sect. 15.—(1.) "Every body corporate or unincorporate chargeable with the duty hereby imposed shall, on or before the first day of December, in the year one thousand eight hundred and eighty-five, and on or before the first day of October in every subsequent year, deliver, or cause to be delivered, to the Commissioners or their officers, a full and true account of all property in respect whereof any such duty shall be payable, and of the gross annual value, income, or profits thereof accrued to the same body in the year ended on the preceding fifth day of April, and of all deductions claimed in respect thereof, whether by relation to any of the before-mentioned exemptions from such duty or as necessary outgoings.

(2.) "The account shall be made in such form and shall contain all such particulars as the Commissioners shall, by any general or special notice require, or as shall be necessary or proper for enabling them fully and correctly to ascertain the duty due, and every accountable officer hereinbefore made answerable for payment of duty in respect of any property chargeable under this Act, shall be answerable also for the delivery to the Commissioners of such full and true account as aforesaid of and relating to such property."

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The secretary appeared to the writ, and made an affidavit stating the material facts of the case as follows:—

"1. At a meeting of the members of the Bar of England, held in Lincoln's Inn Hall, on November 28, 1864, a scheme of reporting the decisions of the Superior Courts of Law and Equity was adopted, and a Council composed of members of the Inns of Court and the Incorporated Law Society was subsequently constituted, and under the management of such Council a series of reports of the decisions of the various Courts of Law and Equity was, from the year 1866 until the year 1870, published, such reports being known as 'The Law Reports.'

"2. In the year 1870 it was considered desirable that the Council of Law Reporting should be incorporated, and accordingly application was made to the Board of Trade under the provisions of s. 23 of the Companies Act, 1867, for a licence for the registration of an association to be called 'The Incorporated Council of Law Reporting for England and Wales,' with limited liability, but without the addition of the word 'limited' to its name; and on July 21, 1870, a licence was accordingly granted by the Board of Trade, directing the Incorporated Council of Law Reporting for England and Wales to be registered with limited liability without the addition of the word 'limited' to its name, upon proof that it was formed for the purpose of promoting objects of the nature contemplated by s. 23 of the Act, and that the intention was to apply its income and property solely towards the promotion of its objects, and that the payment of any dividend was prohibited.

"3. The association was duly incorporated, and its memorandum of association stated the objects for which it was established to be:—

"(1.) The preparation and publication in a convenient form at a moderate price and under gratuitous professional control of reports of judicial decisions of the Superior and Appellate Courts in England.

"(2.) The issue, periodically or occasionally, of any subsidiary or other publications relating to legal subjects which it may be considered expedient to combine with the publication of such reports, including the statutes of the realm, or any part thereof, if deemed expedient.

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"(3.) The continuation (in furtherance of the above objects) of the series of reports called 'The Law Reports,' (now in course of publication by the present Council of Law Reporting) under their present or any other name, and either in their present form and according to the present system, or subject to any alteration of form or system that may be considered conducive to the promotion of the above objects; and the issue, periodically or occasionally, of any legal digests or other publications connected with 'The Law Reports,' or subsidiary thereto, or which may be considered likely to increase the utility thereof; and the acquiring, by purchase or otherwise, on such terms or conditions as shall be considered expedient, the copyright of any rival or other publication of law reports which may now or shall hereafter exist or be in course of publication, and the making any agreement or arrangement for the purpose of procuring the discontinuance of such reports, or the publishing thereof, or the discontinuance of preparing reports for any such publication by any other persons. The taking over and assuming all the assets and liabilities of the existing Council of Law Reporting.

"(4.) The doing all such other lawful things as are incidental or conducive to the attainment of the above objects.

"4. On the 2nd of August, 1870, the Incorporated Council of Law Reporting for England and Wales accepted the transfer of 'The Law Reports,' and the other publications vested in the Council of Law Reporting, and the copyrights thereof, and the property in the unsold copies of the same, and of the statutes, and all contracts and engagements of such Council of Law Reporting, under the aforesaid scheme, with their editors, reporters, publishers, printers, secretary, and others employed by the said Council of Law Reporting, and all the moneys and assets whatsoever of the said Council, and assumed all the liabilities and obligations of that body, and from that date forward the said Incorporated Council have, in accordance with their objects as specified in their memorandum of association, continued the publication of the said 'Law Reports.'

"5. For the purpose of so doing the Incorporated Council have carried on the trade or business of publishers and sellers of 'The Law Reports,' and also the business of publishers of and

dealers in other works which are more particularly hereinafter referred to.

"6. The business has been carried on upon the following system:—The Incorporated Council receive from the Government, and from barristers, solicitors, and the public generally, subscriptions of various amounts, and in return for these they compile, edit, publish, and supply to their subscribers, under the superintendence and control of the said Incorporated Council, and competent editors and reporters appointed by them, reports of judicial decisions of the Superior and Appellate Courts in England. The Incorporated Council also from time to time, through their publishers, sell and dispose of such portions of their stock of 'Law Reports' as are not required for the purpose of supplying their subscribers to any members of the public who may be desirous of purchasing them at such prices as the Council from time to time consider expedient.

"7. The annual subscription required by the Incorporated Council from subscribers to entitle them to the entire series of 'Law Reports' and 'Weekly Notes' published by the Council during each year, and to a copy of the Statutes for the year, was until the year 1885, five guineas, and the annual subscription to the 'Indian Appeals,' a separate publication, being reports of the decisions of the Privy Council on Appeals from the East Indies, was, and is, one guinea per annum.

"8. In the year 1885, it having been found that the amount of revenue arising from this source exceeded the actual wants of the Incorporated Council for the purpose of carrying on its business and paying its outgoings as hereinafter mentioned, the Council in that year reduced the annual subscription to the 'Law Reports,' 'Weekly Notes,' and Statutes to the sum of four guineas, and that amount has continued to be the annual subscription ever since, but made no alteration in the amount of subscription to 'The Law Reports (Indian Appeals).' All subscriptions are required by the Incorporated Council to be prepaid.

"9. The only other sources of revenue of the Incorporated Council are the interest upon money which they may from time to time have on deposit at their bankers, and the income derived

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by them from certain investments in the government funds and in metropolitan stock, which they have from time to time made out of accumulations of income in excess of the expenditure for the purpose of their business. Such investments have from time to time been augmented or reduced by the Council in carrying on their business according as they had surplus funds at their disposal or the contrary. Save and except as above stated, and save and except the stock of 'Law Reports,' 'Indian Appeals,' and other books hereinafter referred to, which they may have in hand from time to time, together with an iron safe and a few insignificant articles of little value, the Incorporated Council have no real or personal property whatever.

"10. In addition to printing and publishing 'The Law Reports' and Statutes as above mentioned, the Incorporated Council have from time to time compiled, edited, and published Digests of 'The Law Reports' and other works, and contracted with the Queen's Printers for the statutes for the year, and have also issued other publications which they have considered would be useful or of interest to the members of the legal profession, and they have also purchased from the Government tables and indices to the statutes which have from time to time been published by the Government, and they have either supplied such works as are in this paragraph referred to to their subscribers gratis, as being covered by their subscription, or have sold them and the surplus copies to their subscribers and the public at such prices as they have considered expedient, having regard to the financial requirements of the business.

"11. The outgoings of the Incorporated Council consist of:—

(*a.*) The cost of printing and delivery of Reports, Statutes and Digests as above-mentioned.

(*b.*) Payment to Her Majesty's Government or others for works which they have from time to time considered it expedient to purchase and circulate and resell as above mentioned.

(*c.*) Remuneration of the editors and reporters, the secretary, and other officers or servants employed by the Council for the purpose of producing 'The Law Reports' and other works above referred to.

(*d.*) Office and other general expenses connected with the carrying on of the business.

"12. The business transacted by the Incorporated Council has in all its essential features been, and now continues to be, of the same character as the business carried on by publishers of other series of law reports, who publish such reports with the object of making for their own benefit profits out of such publication. The Incorporated Council have carried on their business at a considerable profit, which however has been accumulated and invested, but no portion of any such profit or accumulations has been divided amongst the members of the Council, such division being prohibited by the terms under which the permission of the Board of Trade to its incorporation was given, and by the memorandum and articles of association.

"13. I verily believe that the only respects in which the business of the Incorporated Council differs from that of any other publisher of law reports is that the supervision exercised over the business by the Council is gratuitous, as provided by its constitution, and the profits which are made are not divided amongst its members, but are either accumulated, or applied in furthering the objects for which the Incorporated Council was established as set forth in the memorandum of association.

"14. The Commissioners of Inland Revenue have contended that the Incorporated Council are liable to be assessed for, and to pay income tax upon, the surplus of their income over their expenditure, as being the balance of their profits or gains within the meaning of 5 & 6 Vict. c. 35, s. 100, Schedule D, and the Incorporated Council have made the returns required of them under that Act, and have been assessed thereunder, and have paid the amount of income tax for which they have been so assessed. No such income tax was payable for the year 1887–8, because it appeared by the return so made as aforesaid, and was the fact, that the income of the Incorporated Council did not exceed its expenditure."

Sir E. Clarke, S.G., and *Dicey*, for the Crown. There are two questions in this case which it will be convenient to have argued and decided separately. The first is whether this society is bound

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to make a return of its property under s. 15 of the Customs and Inland Revenue Act, 1885. The society claim that, by s. 11, sub-s. 5, all their property is exempt, and that therefore they are not bound to make any return whatever. But assuming all their property to be exempt, they are still bound to make a return under s. 15 in order that the Crown may be satisfied that they are entitled to the exemption. If that was not the effect of s. 15, then such a body as this would be entitled to decide for themselves whether or not they are taxable. By the Act the duty is imposed upon bodies corporate or unincorporate, and not upon property, and every such body is bound to make a return of all its property; and, if entitled to do so, to claim exemption under the Act, stating their grounds. The case of *Re Duty on the Estate of the New University Club* (1) really decides the point, as appears from the order made by the Court. (2) The general object of the statute was to bring into contribution to the revenue the property of all bodies corporate or unincorporate who are not subject to pay legacy or succession duty. If any doubt exists as to the true construction of s. 15 such a construction should be applied as would favour that general object.

Rigby, Q.C., and *Tyrrell Paine*, for the Council. If the Council were bound to make a return, it could only be that they had no property chargeable with the duty, because they were entitled to exemption as regarded all their property on the ground that they were established for a trade or business within the meaning of s. 11. Where the question of liability to duty depends upon the particular class of property, or the mode in which it was acquired, a return becomes important; but where, as in this case, all the property, of whatever kind and however acquired, is exempt from duty by reason of the constitution and nature of the society, a return is needless. In the case of the *New University Club* (1) the question whether the duty was payable did not depend upon the constitution or nature of the society, but upon the nature of the property in respect of which exemption was claimed. That case therefore is wholly different from this. It will be seen that most of the sub-sections of s. 11 refer to particular classes of property, but that sub-ss. 4 and 5 refer to the property of particular

(1) 18 Q. B. D. 720. (2) At page 721.

kinds of bodies, and exempt the whole property of those bodies. The case of the *New University Club* (1) was decided upon one of the former class of sub-sections, sub-s. 6, whereas this society claims exemption under one of the latter class, namely, sub-s. 5. This society is not a body "chargeable with the duty hereby imposed" within the meaning of s. 15, and is therefore not bound to make a return.

Sir E. Clarke, S.G., in reply. By s. 11 the duty is imposed upon every body corporate or unincorporate the property of which is not liable to legacy or succession duty; and by s. 15 every such body must make a return of all property in respect whereof the duty is payable, "and of all deductions claimed in respect thereof, whether by relation to any of the before-mentioned exemptions from such duty or as necessary outgoings." Those words shew the intention that if any body claims exemption under any of the sub-sections, it must make a return, and claim such exemption in that return.

LORD COLERIDGE, C.J. I have come to the conclusion that the point now submitted to the Court is not concluded by the decision in the case of the *New University Club*. (1) If that case had not been distinguishable, I should, of course, have been bound to follow it. However, I have been satisfied by the argument of Mr. Rigby that that case is not directly in point, and we are therefore left free to give our own opinion upon the construction of the Act in reference to this preliminary point as to the Council's duty to make a return.

The argument on behalf of the Crown, as I understand it, is this: It is said that the general object of the Act, or of s. 11, being to bring into contribution to the revenue the property of bodies corporate or unincorporate who are not liable to probate, legacy, or succession duties, wherever there is a fair doubt upon the construction, such a construction must be applied as will favour, rather than disfavour, that general object. I agree that the rule of construction is a good one: I agree that the right way is, first, to ascertain what is the main object of the statute, and then, if any doubt arises, to construe the doubtful passage so

(1) 18 Q. B. D. 720.

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as to effectuate the main object of the Act rather than to contradict or contravene it. But although the main object of the Act is clearly that which I have stated, yet it is equally clear that certain classes of property are broadly and distinctly exempted from the operation of the taxing portion of s. 11. I agree that the exemptions apply only to property and not to bodies corporate or unincorporate. The words are: "Subject to exemption from such duty in favour of property of the descriptions following." Then sub-ss. 4 and 5 (which I think are properly to be classed together) provide exemptions in respect of the "property of any friendly society or savings bank," and "property belonging to or constituting the capital of a body established for any trade or business." Now those are the words upon which we have to decide in this case. The words upon which my learned Brothers had to decide the case of the *New University Club* (1) were those of sub-s. 6, which are: "Property acquired by or with funds voluntarily contributed to any body corporate or unincorporate within a period of thirty years immediately preceding." It is obvious that a body corporate or unincorporate might have a great deal of property not acquired by funds voluntarily contributed to it within a period of thirty years. There is no reason that I am aware of why a member of a club might not leave books or pictures or other property to the club for the purpose of lightening the members' subscriptions or increasing their comforts. It is also obvious that where there was property acquired by or with funds voluntarily contributed during the period of thirty years, and property which was not so acquired, the Crown could only judge what property did, and what did not, come within the exemption by having a return made of the whole. It seems to me, therefore, looking carefully at the words of sub-s. 6, that the decision in the case of the *New University Club* (1) was perfectly right. But we have here to deal with perfectly different words. It signifies nothing, under the 4th and 5th sub-sections, how the property has been acquired. In order to entitle the corporate or unincorporate body to exemption it is sufficient if the property, however acquired, belongs to one of the specified bodies, namely, a friendly society or savings

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bank, or a body established for any trade or business. If it does belong to one of those specified bodies, it seems to me that the whole property of such body is absolutely exempt from the duty, and the only question which could arise would be whether or not the particular body on whom it was sought to impose the duty was, in fact, either a friendly society or a savings bank, or established for any trade or business. One must come, then, to the consideration of s. 15, which provides for a return, with one's mind already satisfied that the whole of the property, no matter how it has been acquired, of the body called upon to make the return is already exempted from the duty by the express words of the Act. That being so, the body is not a body "chargeable with the duty hereby imposed" within the meaning of those words in s. 15. I admit that that is only an inference. But by s. 11 the property only is chargeable, and where the body has no property which is chargeable it follows that it is not chargeable with the duty imposed by the Act. As it is only chargeable in respect of its property, and it has no property which is chargeable, it is not within the direction of s. 15, which says that a body chargeable with duty shall deliver a full and true account "of any property in respect whereof any such duty shall be payable," &c. By the hypothesis in the present case there is no property in respect of which any duty is payable, and therefore the Council is not a body chargeable, nor bound to deliver an account. I do not deny that the concluding words of clause 1 of s. 15, "and of all deductions claimed in respect thereof, whether by relation to any of the before-mentioned exemptions from such duty or as necessary outgoings," raise an argument against the view I have expressed. But that argument is not, to my mind, of sufficient strength to overbear the plain and direct result of the enactments of the statute; and when I consider that, if the argument for the Crown be correct, every friendly society and every savings bank in this kingdom must make a return, although it was admitted that such a return would be perfectly otiose, because the whole of their property by the plain words of the Act is absolutely exempt, I cannot believe that the legislature intended any such result. It cannot have been intended that bodies whose whole property is exempted by

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the Act itself should make a return which would be perfectly needless and idle. I am therefore of opinion that the Council is not bound to make a return in this case.

MANISTY, J. I am clearly of opinion that the distinction taken by Mr. Rigby between the case of the *New University Club* (1) and this is a sound and substantial distinction. In that case the club had property of various kinds, some, it might be, acquired out of funds voluntarily contributed, and some not. The Court held that an account must be rendered in order that it might be seen what part of the property was so acquired. In the present case the point is this: By s. 15 "every body corporate or unincorporate chargeable with the duty hereby imposed shall deliver a full and true account of all property in respect whereof any such duty shall be payable"; and it is said that this institution, having property belonging to them, are bound to deliver an account. It is true that they have property, but it is property which belongs to them as a body corporate established for a trade or business. That being so, have they any "property in respect whereof any such duty is payable?" By sub-s. 5 of s. 11 "property belonging to a body corporate or unincorporate established for any trade or business" is not chargeable with the duty imposed by the Act, and therefore is not "property in respect whereof any such duty is payable" of which an account must be delivered under s. 15. I found my judgment upon this —as the plain result of reading the sections together—that property belonging to a body corporate established for any trade or business is not property chargeable under the Act. The words in s. 11, "subject to exemption from such duty," have the same effect as if the legislature had said that the various properties specified in the sub-sections were excluded from the operation of the statute. Sect. 15 only directs an account to be delivered of property in respect whereof duty is payable. If, therefore, the property belonging to this institution is not within the operation of s. 11, it is property in respect of which no duty is payable, and it follows that the direction to render an account in s. 15 does not apply.

(1) 18 Q. B. D. 720.

It is said that the words in s. 15 directing that a return should also be made "of all deductions claimed in respect thereof, whether by relation to any of the before-mentioned exemptions from such duty or as necessary outgoings," shew the intention of the legislature that, where exemption is claimed under any of the sub-sections, a return must be made of the property of the body claiming exemption. Now, if the Incorporated Council of Law Reporting were to make a return to this effect: "We have no property chargeable with duty, because we are a body established for a trade or business," could it be said that they would be liable to the penalty for making an untrue return which is imposed by the Act? It seems to me a very strong proposition that any liability to make a return is cast upon a body where there is nothing chargeable, and nothing that could be chargeable.

I am clearly of opinion that this case is distinguishable from that of the *New University Club* (1), and that our decision ought to be that no return is necessary.

The question was then argued whether the Council were entitled to exemption as being a body "established for any trade or business," within the meaning of s. 11, sub-s. 5.

Sir E. Clarke, S.G., for the Crown. It is submitted that the Council were not established for any trade or business. They obtained a licence from the Board of Trade, under s. 23 of the Companies Act, 1867 (30 & 31 Vict. c. 131), to be registered as a company with limited liability without the addition of the word "limited." That section is headed, "Associations not for Profit," and applies to associations formed for the purpose of promoting "commerce, art, science, religion, charity, or any other useful object," and where "it is the intention of such association to apply the profits, if any, or other income of the association in promoting its objects, and to prohibit the payment of any dividend to the members of the association." That section was clearly not intended to apply to trading companies, and the fact, therefore, that this society have obtained such a licence shews that they are not a corporation established for a

(1) 18 Q. B. D. 720.

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trade or business. The fund which the Council have invested is exactly the sort of property that the Customs and Inland Revenue Act intended to tax. It is property vested in an association upon such permanent trusts that the same is not liable to pay legacy or succession duty. The Council clearly is not established for any trade or business, in the ordinary sense of those words; it does not buy and sell again with a view of making a profit. By the conditions of its constitution it is prohibited from dealing with its income as if it carried on an ordinary trade or business.

If the society claim to come within sub-s. 3 of s. 11 of the Act on the ground that their property is appropriated and applied for the promotion of education, literature, or science, they are bound to render a return shewing the property to have been so applied.

Tyrell Paine, for the Council. The society does carry on a business; it has, as a fact, made a profit, though it is not necessary that a "business" should be carried on so as to make a profit, or with that intention: *Paddington Burial Board* v. *Inland Revenue* (1); *Bramwell* v. *Lacy* (2); *Rolls* v. *Miller*. (3) The fact that a licence was obtained under s. 23 of the Companies Act, 1867, does not shew that the association was not established for any trade or business, because a trade or business can be carried on for the purpose of promoting the objects specified in that section.

The society is also entitled to the exemption given by sub-s. 3 of s. 11, inasmuch as its property is appropriated and applied to the promotion of legal education and of legal science.

Sir E. Clarke, S.G., in reply. The case of the *Paddington Burial Board* v. *Inland Revenue* (1) was decided upon the words of 5 & 6 Vict. c. 35, s. 100, Sched. D., which are much more comprehensive than the words of this Act. The other two cases of *Bramwell* v. *Lacy* (2) and *Rolls* v. *Miller* (3) were only decisions upon the very large terms of certain covenants made between the parties, and simply decide what was the agreement between those parties. The words of this Act are strictly limited to "any trade or business."

(1) 13 Q. B. D. 9. (2) 10 Ch. D. 691.
(3) 25 Ch. D. 206; 27 Ch. D. 71.

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LORD COLERIDGE, C.J. The point we have now to decide is entirely distinct from the first point, on which we have already given our decision. The question is simply whether the Council of the Law Reports are established for carrying on a trade or business. If they are, it follows that they are exempted in respect of their property, howsoever and from whomsoever acquired, from the duty imposed by s. 11. If they are brought within the words of sub-s. 5, they are outside the operation of s. 11. That section, after stating in the preamble a certain mischief which it was intended to prevent, enacts that certain bodies shall pay a duty, in the nature, perhaps, of probate, legacy, or succession duty. That duty is imposed for the first time by the Act, and the liability in respect of it is, of course, limited by the terms of the Act. Now the mischief which it was sought to prevent is very clearly described in s. 11; and if Parliament had intended to treat a body like this as being—which it perhaps is, to some extent—within that mischief, and to apply the remedy provided by the Act to it, that could have been done in equally clear terms. But Parliament distinctly did not so intend, and has therefore enacted the taxing portion of the section, "subject to exemption from such duty in favour of property of the descriptions following." Then the exemptions in sub-ss. 4 and 5 are in respect of friendly societies and savings banks, and property "belonging to or constituting the capital of a body . . . established for any trade or business." I may ask, as I asked during the course of the argument, what is it that the Incorporated Council of the Law Reports do if they do not carry on a business? They do something; they carry on something; they are very actively engaged in something. I confess I should have thought it capable of strong argument that they carried on a trade, because it is not essential to the carrying on of a trade that the persons engaged in it should make, or desire to make, a profit by it. Though it may be true that in the great majority of cases the carrying-on of a trade does, in fact, include the idea of profit, yet the definition of the mere word "trade" does not necessarily mean something by which a profit is made. But putting aside the question whether they carry on a trade, how can it be denied that the Council carry on a business? They are

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incorporated; they have a secretary; they employ editors, reporters, and printers; they print books; they sell those books; they do all that is ordinarily done in carrying on the business of a bookseller. It is said that though they make a profit, they cannot, by the terms of their memorandum of association, put that profit into their own pockets. Be it so; they are carrying on a business in which, by the terms of its constitution, they are prevented from making a profit to their own benefit. One can suppose the case of co-operative stores founded upon the principle that no profit shall be made by the members. They buy and sell, and if any profit is made, their articles of association compel them to dispose of it in this or that way, but prevent the members putting any money into their own pockets. They also would probably employ secretaries, and other persons engaged in their warehouses and in buying and selling goods all over the country. Could it possibly be denied that such an association of persons were not carrying on a business? Though their objects might be more extended and numerous, I cannot see that in principle such an association could be distinguished from that in question in the present case. As I have before pointed out, the words of the 4th and 5th sub-sections differ from the words of the 6th, 7th and other sub-sections of s. 11. Under the 4th and 5th sub-sections it matters not how the property is acquired, or in what way it is disposed of: the association is wholly exempted from the duty in respect of it, if it is property belonging to or constituting their capital. It is clear that the property described in the secretary's affidavit, and in the annual reports and financial statements which we have had before us, is property belonging to or constituting the capital of the Council, and that they have no other property. They are possessed of it as a body established for carrying on a business, and therefore they are, by the express terms of the statute, wholly exempt from duty in respect of it.

I am of opinion that the case for the Crown fails, and that our judgment should be for the Council of the Law Reports.

MANISTY, J. The Council of the Law Reports are, no doubt, in some respects a somewhat peculiar body. In 1870 they were

incorporated, and obtained a licence under s. 23 of the Companies Act, 1867, but before their incorporation they were individuals carrying on what I may term the same business as they have since carried on as a corporate body. Sect. 23 enables the Board of Trade to grant licences to associations of persons to be registered as companies with limited liability but without the addition of the word "limited." In order to come within the provisions of that section an association must prove to the Board of Trade "that it is formed for the purpose of promoting commerce, arts, science, religion, charity, or any other useful object, and that it is the intention of such association to apply the profits, if any, or other income . . . in promoting its objects, and to prohibit the payment of any dividend to the members of the association." The key-note of the section is the prohibition against payment of dividends to the members. That is one of the conditions upon which the licence can be obtained. To my mind it is immaterial, except for the purpose of obtaining the licence, whether in fact the payment of dividends was prohibited. It is only material that the payment of dividends should be prohibited in order to enable the association to obtain the licence. In all other respects they are a limited liability company, with all the rights and privileges of such companies. It is important to bear in mind that the duty imposed by the Customs and Inland Revenue Act, 1855, is a new duty entirely distinct from the income tax. It appears that in some years the Incorporated Council did make a profit, and in respect of that profit they were liable to pay, and have paid, income tax. No question, therefore, of liability to be taxed in respect of making profits or paying dividends arises in this case. The Customs and Inland Revenue Act, 1885, was intended to cover the case of certain companies in the city of London and elsewhere, whose property, because they were corporations, has never been subject to what are called the death duties; and the object of the legislature was to impose a new duty upon certain companies—not by any means upon all, because I think the number affected by the Act would be comparatively limited—who were not liable to the death duties. But to my mind the legislature never intended to cripple the business of companies by the imposition of the new tax. The Crown get the income tax from

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companies who carry on a business; and if the Council in the present case make a profit, they are liable to pay income tax upon it. But the question is, are they liable to the new duty imposed by the Act of 1885 as a compensation to the revenue for the loss of death duties? I think they are not. The effect of the proviso in s. 11, "subject to exemption, &c.," is to take out of the general enactment all that is included in the sub-sections, and therefore if the Council of the Law Reports are brought within the words of sub-s. 5 they are wholly exempt from the duty. I am of opinion that they do come within the words of sub-s. 5 as being a body established for carrying on a business. I may ask, as my Lord has done, what is it, if it is not a business? I am clearly of opinion that it is a business, and therefore that they are exempt from the duty.

I decline to discuss the question raised under sub-s. 3 of s. 11, because I am clearly of opinion that the society are exempt under sub-s. 5.

Judgment for the Council of the Law Reports.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*
Solicitors for the Council: *Linklaters & Co.*

W. A.

Dec. 21.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF J. F. PEMSEL *v.* THE COMMISSIONERS OF INCOME TAX.

Revenue—Income Tax—Allowances—"Charitable purposes"—5 & 6 Vict. c. 35, s. 61, Sched. A.

By Sched. A of the Income Tax Act of 1842 (5 & 6 Vict. c. 35), allowances are to be made in respect of the duties in that schedule on, inter alia, the rents and profits of lands, tenements, hereditaments, or heritages vested in trustees, for charitable purposes, so far as the same are applied to charitable purposes.

Freehold estates were conveyed to trustees, upon trust to apply two-fourths of the income for the purpose of maintaining, supporting, and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, known as the Moravians; one-fourth for the maintenance, support, and education of the children of ministers and missionaries of the church, and the remaining fourth to the maintenance of establishments for the residence and support of single persons belonging to the church. On an application for a

mandamus to the commissioners to grant an allowance in respect of the rents and profits on which income tax had been paid :—

Held, that the trustees were entitled to the allowance:

By Lord Esher, M.R., and Lopes, L.J., on the ground that in a Taxing Act applicable to the three kingdoms, the words "charitable purposes" must be taken in their ordinary signification and not as technical legal terms; that the words import a benefit to persons who, by reason of poverty, would not otherwise obtain such benefit, and that they included all the objects of the trust.

By Fry, L.J., on the ground that the words are technical words, having the same meaning in all three kingdoms; that they comprise all the uses and intents mentioned in the preamble to 43 Eliz. c. 4, and all analogous uses and intents, and consequently included all the objects of the trust.

RULE calling on the Commissioners for Special Purposes of the Income Tax to shew cause why a writ of mandamus should not issue directed to them commanding them to grant to J. F. Pemsel, the treasurer of the church of the United Brethren, commonly called the Moravians, the allowance of 73*l.* 8*s.* 3*d.* in respect of rents and profits of lands on which property or income tax to that amount had been paid in respect of the year ending April 5, 1886, and to give a certificate of such allowance, together with an order for payment of the same, as provided by s. 62 of the Act 5 & 6 Vict. c. 35.

It appeared that in the year 1813 certain freehold estates had been conveyed to certain persons as trustees upon trust, after payment of costs and outgoings, to apply two equal fourth parts of the income "for the purpose of maintaining, supporting, and advancing the missionary establishments among heathen nations of the said Protestant Episcopal Church, known by the name of Unitas Fratrum, or United Brethren," and for that purpose, with and under the advice and approbation of the bishops and elders of the church, to "apply and dispose of the said two-fourth parts or shares of the said annuities, &c., in such manner as to them, the said trustees, or the major part of them, shall seem meet, and be considered best calculated to promote and advance the object and purposes of the said missions," and as to one-fourth to apply the same with the approbation of certain persons "for and towards the maintenance, support, and education of the children of ministers and missionaries of the church educated at the school or schools and academy or academies at Fulner, near Leeds, in the county of York, special regard being had to the

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children of such ministers as are least able to support the expense of their children's education, or for the benefit and purposes of any similar school, academy, or establishment elsewhere within the United Kingdom," and as to the remaining fourth part to apply the same "for and towards the maintenance and support of certain establishments appertaining to the said church for single persons, called choir-houses, within the United Kingdom." The trust deed declared that if at any time any of the charitable uses and purposes specified should become in any degree impracticable, the trustees might shift the fund devoted to such purposes to the other purposes named, or to such other pious and charitable purposes appertaining to or connected with the church as should seem meet. The choir-houses were certain houses which had been in existence and used for the residence and support of single or unmarried persons belonging to the United Brethren, for more than a century. They were maintained by means of endowments and partly by periodical payments made by the inmates. The inmates were persons approved by the congregational conferences as either deserving in themselves of the benefits of the endowment or as likely to advance the religious interests of the church. They were divided into three classes: (1) single women who had been engaged in the educational department of the church, and who had become incapacitated; (2) widows of ministers or missionaries and of poor members; (3) single men whose chief employments were to look after the young, and to assist in education.

1888. Oct. 27. *Sir Edward Clarke, S.G.* (*A. V. Dicey*, with him), for the Commissioners of Income Tax, shewed cause.

Crackanthorpe, Q.C., and *Bosanquet, Q.C.* (*Russell Roberts*, with them), for the Moravian Trustees, supported the rule.

The following authorities were referred to:—*Morice* v. *Bishop of Durham* (1); *Trustees of the British Museum* v. *White* (2); *Baker* v. *Sutton* (3); *Attorney-General* v. *Bagot* (4); *Cullen* v. *Attorney-General for Ireland* (5); *Attorney-General* v. *Delaney* (6);

(1) 9 Ves. 399.
(2) 2 Sim. & St. 594.
(3) 1 Keen, 224.
(4) 13 Ir. C. L. Rep. 48.
(5) Law Rep. 1 H. L. 190.
(6) Ir. R. 10 C. L. 104.

In re Douglas, Obert v. *Barrow* (1); *Blake* v. *Mayor of London* (2); *St. Andrew's Hospital, Northampton* v. *Shearsmith* (3); *Baird Trustees* v. *Inland Revenue* (4); S. C. nom. *Baird's Trustees* v. *Lord Advocate* (5); *Needham* v. *Bowers*. (6)

LORD COLERIDGE, C.J. The trustees of the Moravian body claim exemption in respect of property which is applicable to three purposes. The income of the property in question is divided into four parts, of which two are devoted to missions among the heathen, one to the maintenance of schools for the education of the children of ministers, and one to the maintenance of choir-houses. The exemption is claimed under 5 & 6 Vict. c. 35, s. 61. That is a general Act applicable to England, Scotland, and Ireland, and affecting the incomes of persons resident in all three countries. Certain allowances are granted by the Act on different kinds of property; amongst others by s. 61, Sched. A, No. VI., "on the rents and profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes, so far as the same are applied to charitable purposes." The question is, whether the trustees of the Moravian body are trustees for charitable purposes, and whether the three purposes to which I have alluded, to which the income of the property in question is applicable, are charitable purposes within the meaning of the Act. The Solicitor-General contends that they are not, on the ground that "charitable purposes" in this statute must be construed as meaning purposes connected with the relief of the poor. His argument is that this is a general Act, which applies to the whole of the United Kingdom, and therefore it must be read in a general and common sense, which will be intelligible and applicable to all three countries. Further, he says that the case is concluded by authority, and contends that we are bound by the decision of the Court of Appeal in Scotland, because this Court, in the interpretation of a general statute applicable to England and Scotland alike, should defer

(1) 35 Ch. D. 472.
(2) 18 Q. B. D. 437; 19 Q. B. D. 79.
(3) 19 Q. B. D. 624.
(4) 25 Scottish Law Reporter, 533.
(5) 15 Sc. Sess. Cas. 4th Ser. 682.
(6) 21 Q. B. D. 436.

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to their view, and leave the point to be finally decided by the House of Lords, whose decision would be binding on the Courts in both countries. The argument for the Moravian trustees is this: They say that the expression "charitable purposes," in the year 1842, when the Act in question was passed, had received in the Court of Chancery a well-known interpretation in the cases decided upon the statute of 43 Eliz. c. 4 (1), and that, as interpreted in those cases, the expression would comprise the property now in question. They say that if this property were devoted to these purposes by will, the Court of Chancery would deal with it according to the principle of the cases decided on 43 Eliz. c. 4, and that the decisions on that statute are authorities which govern the interpretation of the Act of 1842. They also say that there is strong authority on the point, and that the Court of Exchequer in Ireland, on a statute substantially the same as this, decided that the judgments of the Court of Chancery were to be taken as authorities for deciding these cases, and that a decision of the Court of Chancery that property was devoted to a charitable purpose was held, in a case in the Court of Exchequer, to exempt it from the operation of a statute in pari materia with this.

I confess that from the beginning I have entertained a strong opinion that the Crown is entitled to succeed upon several grounds. One ground is the construction of the Act itself. If this were res integra, and there were no authority applicable, I should think that the word "charitable" must be used in a popular sense, and one applicable to all the three kingdoms. I think also that we must take the decisions on 43 Eliz. c. 4, as applicable only to England. The judgment of Sir William Grant, M.R., in *Morice* v. *Bishop of Durham* (2) gives a strong sanction to that view. The question there was whether a certain trust was a trust for a charitable purpose within the decisions of the Court of Chancery. Sir William Grant said (at p. 405): "Do purposes of liberality and benevolence mean the same as objects of charity? That word in its widest sense denotes all the good affections men ought to bear towards each other; in its most restricted and

(1) Repealed by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42).

(2) 9 Ves. 399.

common sense, relief of the poor. In neither of these senses is it employed in this Court." I think the word is to be taken to bear its ordinary and common meaning, and that this is what Sir William Grant meant. No doubt in a broad sense charity is distinguished from the relief of the poor as in the passage, "Though I bestow all my goods to feed the poor, and though I give my body to be burned, and have not charity, it profiteth me nothing." (1) Again, there are expressions in common use, such as "a charitable judgment," or a "charitable view of a person's conduct," which do not mean anything connected with the relief of the poor. But ordinarily speaking the word "charity" denotes something in the nature of eleemosynary relief.

Then are we concluded by authority against deciding according to the ordinary meaning of the word? It is said that *Attorney-General* v. *Bagot* (2) is an authority to that effect, but I think that on examination that decision will be found not to be in point. The question there was whether certain money was exempt from legacy duty on the ground that it was to be applied to a purpose merely charitable. The Court of Chancery had settled a scheme holding that the legacy was a charitable bequest, and afterwards the Crown claimed legacy duty, and the question before the Court of Exchequer was whether legacy duty was payable where a Court of co-ordinate jurisdiction had held that the legacy was a charitable bequest, and the Court held that the duty was not payable. The acceptance of the decision of another Court and the decision of the point in issue are different things.

The Scotch case which has been referred to, *Baird Trustees* v. *Inland Revenue* (3), was on this very point, and there the Court, consisting of the Lord President and Lords Shand and Adam, decided that the tax was payable. The Lord President said (at p. 537): "It appears to me that in the construction of Taxing Acts the Court must always take it for granted, where these Acts apply to the whole United Kingdom, that the words used by the legislature are used in their popular and ordinary signification, and are not technical legal terms, belonging to one system

(1) 1 Corinthians, ch. xiii., v. 3. The Greek word is *ἀγάπην*, which is translated "love" in the Revised Version.

(2) 13 Ir. C. L. Rep. 48.

(3) 25 Scottish Law Reporter, 533 15 Sc. Sess. Cas. 4th Ser. 482.

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of jurisprudence, which may exist in one part of the United Kingdom and not in another. The occurrence of such technical terms as these in a Taxing Act would have the most disturbing and confusing effect, and it would be very difficult indeed to administer such a statute as applicable to the whole United Kingdom. And accordingly we always find in these Taxing Acts that the words used are words of ordinary meaning which are understood by everybody, whether in England, Scotland, or Ireland, in the same sense. To endeavour therefore to import into the construction of this statute the meaning attached to the word 'charity' in certain classes of cases that have occurred in the Court of Chancery in England would be in direct contradiction to the principle which I have just stated. Of course if the statute itself affixes a particular meaning or interpretation to a word of ordinary popular use, it must receive the meaning which the statute gives it, but if there is nothing to interpret it in the statutory sense—if there is no interpretation clause, and no context to shew that the word is used in other than its ordinary sense—then we are bound in administering the statute to give it that ordinary sense, and no other.

"It appears to me that 'charity' and 'charitable' have one sense and one only in ordinary and popular use. Charity is relief of poverty, and a charitable act or a charitable purpose consists in relieving poverty, and whatever goes beyond that is not within the meaning of the word 'charity' as it occurs in this statute. The Court of Chancery, as we know, has extended the use of the word 'charity' to very different purposes—to purposes of general benevolence and of public utility—but I think it is quite impossible, where we are applying the proper rule of construction to a Taxing Act, to give it any such meaning here." Lords Shand and Adam assented to that view of the construction of the Act. In my opinion that decision is directly in point here, for the words and object of the two different sections of the same Act on which the two cases arise are substantially the same. That was the decision of a Scotch Court of Appeal, and any decision of such a Court is entitled to the greatest deference. I agree with the decision, but even if I did not I should think myself bound to follow it in a case like the present, where the

point arises on the construction of a general statute, and any difficulty which may arise can be settled by the House of Lords by a decision which will be binding on the Courts in all three kingdoms.

The decision in *Cullen* v. *Attorney-General for Ireland* (1) has no real bearing on the present case. There the question was whether a bequest intended to be applied to a charitable purpose, which did not appear on the face of the will, was exempt from legacy duty, and the House of Lords held that it was not. Lord Westbury said (at p. 198): "The question then arises, what is the meaning of the words in the statute that has been referred to. The object of that portion of the statute is to charge testamentary gifts with certain rates of duty, according to the existence or the absence of relationship between the testator and the donee. Now a gift by will, or a legacy by will, involves, of necessity, certain things, not only a description of the subject given, but also a nomination or description of the individual to take, or the purpose which is to be answered by the legacy. If there be therefore a gift to A., and if there be a collateral matter which renders A. bound to apply the subject of the gift to some purpose not to be found within the expression of the gift, and the obligation arises not on the face of the will or by virtue of the will, but arises from something aliunde, it follows of necessity that the person, or the purpose to be benefited, cannot, with any correctness of language, be denominated a legatee or a testamentary purpose." In that case the legatees were not bound by the will to carry out the intentions of the testatrix, on the contrary the bequest was to individuals as individuals.

For the reasons I have given I am of opinion that the contention on behalf of the Crown, is correct, and that the rule for a mandamus ought to be discharged.

GRANTHAM, J. In this case, which is one of considerable importance, I have the misfortune to differ from the Lord Chief Justice, and I do so with some diffidence, owing to the respect I feel for his opinion and for the opinion of the Court of Appeal in Scotland.

(1) Law Rep. 1 H. L. 190.

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The conclusion at which I have arrived is that the Scotch Court in *Baird Trustees* v. *Inland Revenue* (1) took too narrow a view of the construction of the statute, and moreover their observations were confined to s. 88, Sched. C., which is narrower in its terms than the clause on which the present case depends. The Act was passed by both Scotch and English representatives. It was passed for the benefit of the Government, and the draftsman must have known the intention of the Government with regard to these duties. The Government has the Act framed and then grants allowances to the Moravian body in respect of these rents and profits; that is the action of those who passed the Act, and made it law. I do not think it can be the case that the Government has constantly misinterpreted the Act. I confess that I am not much struck with the argument based on the Irish cases which have been referred to; I agree with the Lord Chief Justice as to them, for in those cases a more limited question was raised. We must look at the sections applicable to the deed by which this property is settled. Sched. A., dealing with taxation on land, provides for the granting of allowances "on the rents and profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse;" clearly that does not apply to a charity as defined by the Lord President in *Baird Trustees* v. *Inland Revenue*. (2) It is clear that Sched. A., is not confined to institutions for the relief of poverty, for it was held in *Blake* v. *Mayor of London* (3) that the City of London School was a public school within the meaning of the Act, although a great part of its revenue is derived from payments made by pupils for instruction. In the public schools, commonly so called, very few of the poorer classes receive their education; take for instance the case of Eton College which it turns out on inquiry is treated as exempt. A hospital also is not in all cases necessarily for the relief of poverty. The Act then goes on to extend the exemption by the words "or vested in trustees for charitable purposes." That this means something ejusdem generis with the words preceding is shewn by the last clause of s. 61, which refers to "such school,

(1) 25 Scottish Law Reporter, 535; 15 Sc. Sess. Cas. 4th Ser. 682.

(2) 25 Scottish Law Reporter, 533; 15 Sc. Sess. Cas. 4th Ser. 682.

(3) 18 Q. B. D. 437; affirmed 19 Q. B. D. 79.

hospital, or almshouse, or other trust for charitable purposes." I think that here, dealing with the taxation of lands, we have nothing to do with any narrower sense in which Sched. C., which deals with money, may have been interpreted. I do not think there is anything in the case of *Morice* v. *Bishop of Durham* (1) to shew that we ought to interpret the word "charitable" here in the narrower sense referred to in the passage from the judgment of Sir William Grant which has been read by the Lord Chief Justice. It is said that decisions on 43 Eliz. c. 4, have no application because that is only an English statute, but since the Union all Acts relating to Scotland are passed in England, and I think that if there is no interpretation clause limiting its meaning, a statute should be interpreted as it would be understood where it is passed.

For these reasons I am of opinion that we ought not to follow the decision of the Scotch Court in *Baird Trustees* v. *Inland Revenue* (2), and that the exemption which is claimed ought to be allowed.

The Court being equally divided, Grantham, J. withdrew his judgment.

Rule discharged.

P. B. H.

The Moravian trustees appealed.

Crackanthorpe, Q.C., and *Bosanquet, Q.C.*, (*Russell Roberts*, with them), for the appellant.

Sir Edward Clarke, S.G., and *A. V. Dicey*, contrà.

Cur. adv. vult.

1888. Dec. 21. LORD ESHER, M.R. This case raises a question between the Crown and certain bodies of people which in one view may be of the greatest importance. The question is raised between the Crown and the trustees of a certain body called the Moravians, who demand certain allowances under Schedule A. of the Income Tax Acts, in respect of duties which the Crown has received on property of the society. We have to determine what

(1) 9 Ves. 399.

(2) 25 Scottish Law Reporter, 533; 15 Sc. Sess. Cas. 4th Ser. 682.

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is the construction of the statute, and whether, on that construction, the society are entitled to the allowance.

It has been stated, on the authority of the Court of Appeal in Scotland, that where there is an imperial statute, applicable to the three kingdoms, it must be construed according to its popular meaning—not loosely or hypothetically—but as people of ordinary education and intellect would understand it. I should not state this quite in the same way, for I should apply the rule whether the statute to be construed were an imperial statute or not, unless there is something which obliged another construction to be put upon it. But then it is said that the words used in a statute may have acquired a technical or secondary meaning which must be adopted. I think in such a case it must be shewn that they have obtained that meaning not in some particular district or with some limited body of persons, but with as large a body as would have to use them in respect of the subject-matter with which they deal. In the case of a statute, if it is one that deals with the whole of the United Kingdom, we should have to see if the technical meaning which has gained reception has done so with as large a body as that to which the statute applies, that is, with the educated people of Great Britain and Ireland. So that if we find the technical meaning accepted by a limited portion only of those people, that is not a sufficient acceptance to override the commonly accepted meaning of the words. I agree, therefore, entirely with the construction of this statute adopted by the Court of Appeal in Scotland, although we are not bound by it. We look carefully to the decisions of such Courts for assistance, and I have read both the decisions, that of the Court in Scotland and the Court in Ireland, and, without being bound by either, my rule of construction accords with that applied in the former case.

It is said this phrase has acquired a technical meaning, and I think that is so. In the Court of Chancery the judges have looked to the Statute of Elizabeth as a means of determining the extent of their jurisdiction. If the meaning given by the Court of Chancery to the phrase "charitable purposes" is the same as the popular meaning the decisions of that Court would be a guide to us. If it goes beyond the popular meaning, to adopt

it would be a breach of the canon which I have stated I adopt, because that would be to apply an interpretation which does not hold for the whole of the United Kingdom. It is not said the Court of Chancery have put this interpretation on the words as they occur in this particular statute, and we cannot use the interpretation of one statute in construing another not made with the same intent.

Then comes the question, what is the popular meaning of the words? Allowances are to be made in respect of the duties on the rents and profits of lands, tenements, hereditaments, or heritages vested in trustees for "charitable purposes, so far as the same are applied to charitable purposes." The intention of the donor must be an ingredient, for the funds do not arise at the moment that the trust is instituted. What is the meaning of purposes? Something intended to be done and for "charitable purposes," means for a charitable thing to be done. What, then, is the scope of "charitable purpose?" Does it or does it not mean, in a limited sense, the gift of money or something material, to be given to a person for the relief of his physical necessities. Using the words in this limited sense, without reference to other words in the statute, would shut out the education of poor people. If you use the words for something given to persons for physical needs only, however poor, however much in want they may be, nothing but their mere physical wants would be dealt with. I do not think to any educated mind the words would appear to be so limited. If you give to the words the larger sense given to similar words in the Court of Chancery, it would include almost anything given for a public purpose, and would include many things which would be beyond the interpretation of the words among ordinary educated people, such as a grant of money to supply waterworks to such towns as Manchester or Liverpool. One must try and see whether one can paraphrase the expression and give a definition which may be of practical use. It must not be so limited as the first view that I stated would make it, nor so large as the second. I cannot help thinking that in the minds of all ordinary persons charity implies the relief of poverty, and I think there must be in the mind of the donor an intention to relieve poverty. It is not the mere fact

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that the person who receives what is given is poor that constitutes a charity. A gift to a son or a poor relation is not a gift by way of charity, but by reason of the relationship. The paraphrase, therefore, which I adopt, is this. Allowances are to be made in respect of the duties on the rents and profits of lands, tenements, hereditaments, or heritages vested in trustees when the rents and profits are given in trust to be expended in assisting people to something considered by the donor to be for their benefit, and which assistance the donor intends shall be given to people who, in his opinion, cannot without such assistance, by reason of poverty, obtain that benefit, and where the intention of the donor is to assist such poverty as the substantial cause of his gift.

Taking that definition we must consider whether each case as it arises comes within it. It is obvious that there is no limitation to physical want, and also that a desire to give spiritual or religious assistance would not necessarily be included. There may be a desire to convert the richest people, and so a religious object is not necessarily a charitable one. But a charitable purpose is not the less so because it is religious. Take again the case of education. Where the purpose is not to educate the poor, charity does not come in. The large schools and universities of this kingdom are not all charities, though no doubt there are many schools which are charities in which assistance is given for the purpose of educating poor persons. Now comes the question whether the three purposes for which this money was given come within the definition. If I thought that the first of these was a purpose to convert rich heathen or heathen without regard to their poverty, I should think it not within the definition. But I have read the trust, and it seems to me to be for the religious instruction of poor heathen who but for that would not get such instruction. Another part of the trust is for the education of the children of missionaries. In this case I think the donor intended the assistance to be given because of the poverty of the missionaries. As to the choir-houses, I can see clearly that the donor thought he would be benefiting people who required it by reason of their poverty. I have come to the conclusion, therefore, that this case comes within the canon I have stated, and that the allowances ought to be made. It is obvious that we cannot lay

down a rule and say that it shall apply to all cases, but that each individual case must be decided on its own facts.

I agree, therefore, with the Lord Chief Justice as to the interpretation which should be applied to the words of the Act, but I think that the mode of applying that principle to the trusts of this particular case was not sufficiently brought to his notice.

FRY, L.J. The question before us arises upon an application for allowances under the Income Tax Act of 1842, which permits allowances on the rents and profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse, or vested in trustees for charitable purposes. Very similar words are found in the earlier Acts, from that of 1799 onwards. In 1842 was passed the general statute regulating the income tax. In 1853 the Income Tax Acts were for the first time applied to Ireland. In 1885 was passed the particular statute, incorporating that of 1842, under which the charge in question was made. We have, therefore, four points of time at which it might be argued that the proper interpretation then current should be put on the words. We may look either to 1799 when the words were first introduced, to 1842, when we find the words in the guiding Act; to 1853, when for the first time the Act was applied to all the three kingdoms; or to the year 1885, when the particular Income Tax Act was passed under which the duty is claimed. To my mind it is immaterial which of the four periods we take, because I think the meaning was the same at each period, and I only allude to the matter to shew that the discussion as to the true point of time has not escaped me.

There are some rules of construction to which it is convenient to refer. The words of a statute are to be taken in their primary, and not in their secondary, signification. If, therefore, the words are popular ones they should be taken in a popular sense, but if they are words of art they should be primâ facie taken in their technical sense. That was laid down by Lord Wensleydale in *Burton* v. *Reevell* (1), where he says: "When the legislature uses technical language in its statutes, it is supposed to attach

(1) 16 M. & W. 307.

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to it its technical meaning, unless the contrary manifestly appears." That rule is not, in my opinion, the less applicable when the words have a distinct technical meaning and a vague popular one. The second rule is that, where the words occur in a statute imposing taxation throughout the three kingdoms, they should be construed so as to make the incidence of the taxation alike in all three kingdoms. This was considered in *Lord Saltoun* v. *Lord Advocate.* (1) If, therefore, the words used in their technical sense would produce inequality and construed in their popular sense equality, the latter must be taken. That rule, of course, has no application if the words be words of technical meaning, and when applied to all three kingdoms produce the like effect. Now in this section the words "hereditaments or heritages" are used, the one a technical English, and the other a technical Scotch word. Besides these the words "tenements," "vested," "trustees," are strictly speaking words of art, and so I think are the words "charitable purposes." Trusts for charitable purposes are a well-known subject of equitable jurisdiction in all courts that administer equity in all the three kingdoms. They were words of familiar meaning in the Court of Chancery, and are used and explained in numerous cases. The same is true of the Court of Chancery in Ireland, and of the Court of Session in Scotland. The conclusion, therefore, at which I arrive, is that they are well-known technical words, having the same meaning in all three kingdoms.

To support this conclusion I think it will be proper to refer a little more in detail to each of the three kingdoms. In England it is well known that before the Reformation a large amount of property was vested in persons who were bound to apply it to pious uses. After the Reformation many of these were considered superstitious, and therefore illegal. The residue, which were not considered superstitious, embraced a large area and included a great many purposes which were not strictly pious.

Again, it is well known that large masses of property were alienated from the monasteries and fell some into the hands of private persons, and some into the hands of the Crown; and that by legislation of the reigns of Henry VIII. and Edward VI.,

(1) 3 Macq. 659.

property, formerly of ecclesiastical institutions, was placed in the hands of the Crown in order to dedicate it to what were then described as "godly uses." In this way during those reigns and in that of Elizabeth there were founded a large number of charitable institutions, educational, eleemosynary, and other. It was found during the reign of Elizabeth that grave abuses had arisen, and a statute, 43 Eliz. c. 4, was passed, to which I think I am bound to refer, because it is a declaration, not by the Court of Chancery, but by the legislature, of the sense in which "charitable intents" was then used, a sense in which, in my opinion, it has been used down to the present time.

Now that statute enumerates a number of objects for which lands and property had been given, which nevertheless had not been employed "according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence." To my mind it is impossible to read those words and not see that the legislature have declared that the donations recited have been given with a charitable intent, and are therefore charities. It is not necessary to go through the whole of the statute, it is sufficient to notice that the uses to which the property mentioned in the recitals is devoted are described as "charitable and godlie," as "the charitable uses and intents before rehearsed," and as the "charitable uses before expressed." That, in my opinion, is a legislative affirmation, not that there are no other objects of charity, but that those which are mentioned in the preamble are charitable uses. It is not a definition for the purposes of the Acts but a statement of the law by the legislature. The effect of the statute was remarkable. The Court of Chancery had before that time jurisdiction in matters relating to charity, but, so far as I can ascertain, what was charity was a matter open to discussion. The Court however found in the words to which I have referred a declaration of the meaning of the legislature, and thenceforth "charity" meant, in all Courts which had to do with the subject, but mainly in the Court of Chancery, because it was mainly concerned with the subject, all the uses and intents mentioned in the preamble to the statute and all uses and intents analogous to them. Further than that the statute, on the construction of a part of it to which it is not

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necessary to refer, was held to have enlarged the powers of testators and modified the Statute of Wills passed in the reign of Henry VIII. From the time of this statute the expressions "charitable uses," "charitable purposes," "charitable trusts," have, in my opinion, had a well ascertained signification in English law. Of this a remarkable proof is the interpretation put on a statute passed subsequently, alio intuitu, the statute 9 Geo. 2, c. 36. (1) This was passed to put a fetter on the power of disposition in favour of charities, and recites that "public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses," and it subsequently referred to them as charitable uses. When the Court required to find the ambit and extent of the "charitable uses" referred to in that statute they found them to be co-extensive with those of the Statute of Elizabeth and others analogous to them. A more recent illustration is afforded by 9 & 10 Vict. c. 59, which was intended to relieve Jews from difficulties under which they laboured in consequence of their professing a religion other than the Christian religion. The words "charitable purposes" are there used in a way that shews they were intended to be coterminous with their use in the Statute of Elizabeth. I think, therefore, that in 1842, in 1853, as well as at earlier dates, trusts for charitable uses had in England a well ascertained meaning, and that the meaning of the words "trustees for charitable uses" is as well ascertained as that of any other expression in the English law.

Next with regard to Ireland. There are many reported cases, but it is enough for me to point out that in *Powerscourt* v. *Powerscourt* (2); *Incorporated Society* v. *Richards* (3); *Attorney-General* v. *Bagot* (4) and *Attorney-General* v. *Delaney* (5) the Courts of Ireland have taken the same view, and that the expressions we are considering have exactly the same meaning and cover the same area as they are held to do in this country.

As to Scotland, undoubtedly charitable trusts and charitable

(1) Partly repealed by the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42).

(2) 1 Moll. 616.

(3) 1 Dr. & War. 258.

(4) 13 Ir. C. L. Rep. 48.

(5) Ir. R. 10 C. L. 104.

purposes are known to the law and administered by the Court of Session. The Scotch Act of 1633 to which Mr. Crackanthorpe referred us, and the Trusts (Scotland) Act, 1867 (1), s. 16, are illustrations of this. Again, numerous cases have occurred in the House of Lords shewing the exercise of an equitable jurisdiction analogous to that exercised by the Court of Chancery in England. Of these *Clephane* v. *Lord Provost of Edinburgh* (2) and *Magistrates of Dundee* v. *Presbytery of Dundee* (3) are illustrations. But what is perhaps even more to the purpose is the case of *Clephane* v. *Lord Provost of Edinburgh* (4), in which Lord Westbury says (p. 420): "The jurisdiction of the Court of Session in Scotland, and the jurisdiction of a Court of Equity in England, upon the subject of the administration of charitable trusts, are one and the same. Undoubtedly in England we have had a greater number of cases, and therefore the principles have been more fully developed. The rules which have been laid down, and the authorities in England, are of course not binding upon the Court of Session. Yet, as they are illustrations of the same principles of law, I daresay that whenever an opportunity arises the Court of Session will deem them entitled to great respect and attention." It is true, as was pointed out at the bar, that Lord Westbury was not a Scotch lawyer. If I were at liberty to canvass the importance of a statement made by a learned Lord in giving judgment, I should observe that the case had been twice before the House, and that on the former occasion an elaborate decree had been settled and sent back to the Court of Session to work out, and that Lord Westbury was followed by Lord Colonsay who did not express any dissent. Further than that there are a number of cases in the English Courts in which, there having been charitable donations given in England for the purposes of charities in Scotland, the Court has handed the money over for administration in Scotland, apparently without any suspicion of any difference in the manner in which the funds would be dealt with. Further, in the argument before us, though the suggestion was made, no

(1) 30 & 31 Vict. c. 97.
(2) 4 Macq. 603.
(3) 4 Macq. 228.
(4) Law Rep. 1 H. L., Sc. 417.

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illustration was given of any difference with regard to the dealings of the Scotch and English Courts. The conclusion I come to is that the words having the same technical meaning, and producing the same incidence of taxation in the three kingdoms, I am bound to adopt their technical meaning.

There are two cases to which it is proper I should refer. One is *Baird Trustees* v. *Lord Advocate* (1), in which the Scotch Court of Appeal applied the popular meaning to the words "charitable purposes." I need not say that if the judgment had shewn that the powers of the Scotch Courts in administering charitable trusts were different from those of the English Courts, the case would be of very great importance in the view I take of the question. This was not done, but the Court adopted the view that a popular meaning should be put on the words, and they seem to me to have adopted in consequence a very narrow view of the meaning of the words. On the other hand, in *Attorney-General* v. *Bagot* (2), in the Irish Court, this very point was pressed on the Court. The case arose on an exemption in a statute imposing a duty on legacies, and was closely parallel to the present case. The Court took the view that I take, and considered that "trust for charitable purposes" had a distinct legal meaning which should be applied to an exemption in a Taxing Act. These decisions being in direct conflict, I feel free from any bias to follow one or the other.

Such appearing to me the true meaning of the words taken alone, is there anything in the context which would make me put some other meaning on them? Upon that a great deal of minute criticism was addressed to us. It was said that unless a narrow meaning is put on the words "vested in trustees for charitable purposes" the words are tautologous, but that is met by the fact that in the latter part of the section, after referring to school, hospital or almshouse, the trusts are described as other trusts for charitable purposes. Then an argument was addressed to us upon the fact that a special clause protecting the British Museum which was introduced into the earlier Act was repeated

(1) 25 Scottish Law Reporter, 533; 15 Sc. Sess. Cas. 4th Ser. 682.
(2) 13 Ir. C. L. Rep. 48.

in the Act of 1842, after the decision which shewed that the British Museum was a charity. I do not attach importance to this. It is not likely that the attention of the legislature was directed to the point, and it is likely that the trustees of the British Museum would prefer a clear exempting clause to the general one which, as we have seen, is open to observation and doubt.

According to my view, therefore, we ought to apply to these words in the Act the well-known technical meaning in all three kingdoms, and it was not contended that, if this were done, the trust deed of 1813 does not create a charitable trust. I therefore think the appellants entitled to succeed; but I desire to make this further observation. If I am wrong, and a popular meaning is to be put on the words, then, without attempting to define that meaning, I agree with the Master of the Rolls that the objects to which the money is dedicated are "charitable purposes."

LOPES, L.J. If I agreed entirely with the judgments which have been delivered, I should rest satisfied with saying I concurred, but whilst arriving at the same conclusion as the Master of the Rolls and Fry, L.J., I arrive at it by the mode of reasoning of the Master of the Rolls, and am unable to adopt the reasoning of Fry, L.J.

I shall not allude to the different authorities which have been cited, enough has been said about them.

The question which the Court has to determine is what is the true meaning of the words "charitable purposes" as used in Schedule A, rule VI., of the Income Tax Act, 1842. We have to determine whether the true meaning is the technical meaning assigned to those words by the Court of Chancery in England, or the ordinary and popular meaning which these words signify in the English language. If the ordinary and popular meaning, what that meaning is, and finally whether that meaning includes these trusts.

The interpretation given by the Court of Chancery to the words "charitable uses" would clearly include this society. But I cannot think that the legislature intended, in an Act of Parliament which was to apply to England, Ireland and Scotland,

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and having for its object the taxation of the people of England, Ireland and Scotland, to affix a special or technical meaning to these words—a meaning adopted by the Court of Chancery in England in construing instruments containing charitable gifts, and derived from the Statute of Elizabeth, which was a statute relating to England alone.

There are other reasons which make me think the technical meaning is not to be adopted.

In the actual paragraph of Sched. A., rule VI., where the expression "charitable purposes" occurs, these are preceded by the words "rents and profits of lands, tenements, hereditaments, or heritages belonging to any hospital, public school, or almshouse." If the technical meaning is the true one, the enumeration of hospital, public school and almshouse, is surplusage, for the Court of Chancery would include all of them within charitable purposes.

This observation would, I believe, apply to all the exemptions mentioned in the Income Tax Act. For gifts to any purposes specified in the Statute of Elizabeth, or to any purposes of a similar nature, are considered by the Court of Chancery to be gifts to charitable uses within the Statute of Mortmain, 9 Geo. 2, c. 36. Thus all gifts for public purposes, whether local or general, are gifts to charitable uses.

Again I cannot think that the legislature intended the exemption to be so comprehensive as the adoption of the Chancery interpretation of charitable uses would make it. I cannot think the exemption was intended to include all public purposes, whether local or general; such, for instance, as the erecting waterworks in a particular town in a district. But this would be included if the Chancery definition is to be applied.

The Statute of Elizabeth contains a statutory declaration of what are charitable uses for the purposes of that Act, and the decisions of the Court of Chancery would be governing decisions if this was the construction of a will; but they do not, in my opinion, give us any guide as to the meaning of "charitable purposes" mentioned in an Imperial Taxing Act. It is the ordinary and popular meaning in my judgment in which the expression "charitable purposes" is used in this Act of Parliament.

But what does the expression "charitable purposes" mean in the English language in its ordinary popular sense. It would be difficult to give an exhaustive definition. I may say I agree with the definition given by the Master of the Rolls. I think the purpose must be benevolent, and in relief of those in want. I mean of those who could not obtain the relief or benefit otherwise. The idea of poverty, the relief of those in want, appears to me to be inseparably connected with the word "charitable" in its ordinary and popular sense. I do not mean only bodily want. I should include mental and religious want—want of education, both secular and religious, where those to be benefited are poor and ignorant, and unable to obtain the benefit, and supply the want themselves. The application of funds to found a school to teach the poor and ignorant, unable themselves to pay for and obtain education, would be a charitable purpose; or to found a Sunday school where the poor and ignorant, who were unable themselves to pay for such instruction, might be instructed in the Christian religion, would be a charitable purpose, and a charitable purpose within the Income Tax Act.

In this case the Moravian body, or the trustees of the Moravian body, have claimed exemption from income tax in respect of certain property, which is in the hands of trustees applicable to three purposes. The income is divided into four parts, two parts are to be diverted to heathen missions, one part to educational purposes, and one part to choir-houses, where people are brought up for the purpose of becoming missionaries, or becoming teachers of the Moravian tenets in this and other countries.

Now, I assume, these are all purposes which could not be carried out without the income in question, and that the income is used in the education and instruction of those who could not provide this education and instruction for themselves. I am of opinion, therefore, that the income is applicable and is applied to charitable purposes, within the meaning of those words used in the Income Tax Act.

If the education and instruction were intended to be supplied and were supplied, or the missions were to be sent and were sent to those who could provide the education and instruction for

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themselves the case would be very different, and I should think would not come within the exemption.

I agree that the appeal must be allowed.

Appeal allowed.

Solicitor for the Moravian trustees: *A. E. Francis.*

Solicitor for the commissioners: *The Solicitor of Inland Revenue.*

A. M.

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1889 *Jan.* 21.

CONSETT WATERWORKS COMPANY *v.* RITSON.

Waterworks Company—Inclosure Act — Separate Ownership of Surface and Minerals—Compulsory Purchase — Right to work Minerals—Damage to Waterworks—Right of Support—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 18, 22, 23.

By an Inclosure Act the common lands of a manor, the fee simple of which, with the mines and minerals thereunder, and power to work the same, had previously been vested in the lord of the manor, subject to certain rights of common of pasture, were inclosed and divided into allotments.

The Act provided that the lord of the manor should enjoy all mines and minerals as fully and freely as if the Act had not passed, without paying damages or making satisfaction for so doing, and empowered him to make all convenient ways, and for that purpose to remove fences, trees, or other obstructions.

The Act further provided that the annual rental of 500 acres (out of about 20,000) should be set apart to provide for the compensation to which the allottees might thereafter be entitled, any deficiency to be made up by means of a rate levied upon the allottees.

Afterwards the plaintiffs, a waterworks company incorporated under an Act of Parliament, which incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, purchased compulsorily from the representative of the allottee land forming part of one of such allotments, and constructed a reservoir thereon.

The defendant, claiming title under the lord of the manor, gave notice to the plaintiffs of his intention to work the coal under such land within forty yards of the reservoir. The plaintiffs did not offer to purchase the minerals, and the defendant worked the coal according to the usual course and practice of mining, and thereby caused damage to the reservoir. The plaintiffs sued in respect of such damage:—

Held (by Cave and A. L. Smith, JJ.), that the Inclosure Act did not empower the lord of the manor and his representatives to work the minerals in such a manner as to let down the surface.

Held (by Cave, J.), that the plaintiffs had purchased the whole of the allottee's interest, namely, the ownership of the surface together with the right of support, and the defendant had only the same right as he had had before the

purchase by the plaintiffs, namely, the right to work the minerals, leaving sufficient to support the surface, and therefore the plaintiffs were entitled to recover.

Held (by A. L. Smith, J.), that, as at the date of the purchase by the plaintiffs the surface and the minerals were vested in different owners, and the plaintiffs had purchased compulsorily from the owner of the surface, and had given no notice to treat in respect of the minerals, all that they were entitled to was the ownership of the surface, without any right of support as against the defendant, and therefore they had no cause of action for damage caused by the working by the defendant of the minerals according to the usual course and practice of mining, and were not entitled to recover.

ACTION to recover damages for injury to the reservoir of the plaintiff company, alleged to have been caused by the acts of the defendant in working coal mines. (1)

The case came before the Court on points of law raised on the pleadings under Rules of Supreme Court, 1883, Order XXV., r. 2, certain admissions of fact being made for the purpose of the argument.

The facts and arguments are fully stated in the judgments.

1888. May 9, 10. *Sir Henry James, Q.C.*, and *H. F. Manisty*, for the plaintiffs.

Sir R. Webster, A.G., Rigby, Q.C., and *Danckwerts*, for the defendant.

Cur. adv. vult.

1889. Jan. 21. The following judgments were delivered—

A. L. SMITH, J. This is an action brought by the plaintiffs against the defendant for having by mining operations let down

(1) The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 18, excepts from conveyances to the undertakers mines and minerals unless expressly purchased.

Sect. 22 provides for the giving by the owner of the minerals of thirty days' notice of intention to work the mines or minerals within the prescribed distance (if any), or, if no distance is prescribed, within forty yards, of the works, and empowers the undertakers on receipt of such notice to take the minerals, making compensation.

By s. 23: "If before the expiration of such thirty days the undertakers do not state their willingness to treat with such owner, lessee, or occupier, for the payment of such compensation, it shall be lawful for him to work the said mines, and to drain the same, by means of engines or otherwise, as if this Act and the special Act had not been passed, so that no wilful damage be done to the said works, and so that the said mines be not worked in an unusual manner."

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the surface of the land upon which the plaintiff's reservoir stood, wherein they claimed damages and an injunction.

The material facts necessary for determining the points now in question are as follows:—

In and prior to the year 1773 the Lords Bishops of Durham were lords of the manor of Lanchester in the county palatine of Durham, and as such were entitled in fee simple to the moors, commons, and waste land therein, and the mines and minerals thereunder, and to mine, win, work, and carry away the same, subject to certain rights of common of pasture to the commoners thereon appertaining.

In that year (viz. 1773) an Act for the dividing and inclosing of these moors, commons, and waste lands, and for allotting the same among allottees, was passed (1), and pursuant thereto divers allotments were made to the different allottees therein designated.

One of these allotments was made to George Clavering, the predecessor in title of John Clavering, as having a right of common upon the moors or commons appurtenant to his freehold.

The plaintiffs were incorporated by the Consett Waterworks Act, 1860 (2), which incorporates the Lands Clauses Consolidation Act, 1845 (3), and the Waterworks Clauses Act, 1847 (4), and obtained further powers under subsequent Acts.

In the year 1876 the plaintiffs purchased compulsorily from John Clavering the site upon which their reservoir is built, being some of the land allotted to George Clavering as aforesaid.

The defendant claims title under the Lord Bishop of Durham to work the mines and minerals under the plaintiffs' property, and on September 13, 1878, he gave notice to the plaintiffs that he intended to work the coal under the plaintiffs' land within a distance of forty yards from the reservoir. The plaintiffs did not, within thirty days thereof, or at all, state their willingness to treat with the defendant, whereupon he proceeded to work such coal according to the usual course and practice of mining, and did the damage complained of, and hence the present action.

(1) 13 Geo. 3, c. lxvii. (private Act).
(2) 23 & 24 Vict. c. cx.
(3) 8 & 9 Vict. c. 18.
(4) 10 & 11 Vict. c. 17.

The first question which arises is this. Is the Bishop of Durham, and consequently the defendant (for he has the same rights, no more and no less than the Bishop), entitled to win in the ordinary and accustomed manner the minerals lying under the lands allotted to the Claverings so as to let down the surface? If yes, the judgment must be for the defendant.

If, however, this question be answered in the negative, then arises the further question, Are the plaintiffs in the same position, and have they the same right of support, as the Claverings?

It was argued on the defendant's behalf that the Bishop had a perfect right to let down the Claverings, assuming, as is admitted, that the working was according to the usual course and practice of mining at the time of such mining, and also that, if this proposition was not established, yet the plaintiffs, on account of their having purchased the land compulsorily under the Lands Clauses Consolidation Act, 1845, by reason of the Waterworks Clauses Act, 1847, were not entitled to the support of the subjacent minerals, not having purchased the same.

As to the first point, this depends entirely upon what is the true construction of the Inclosure Act of 1773. Is the lord of the manor under this Act entitled to work his mines to an extent which might lead to the utter destruction of the surface, subject only to the limited compensation therein provided for the damage so done, as was held by the House of Lords to be the true construction of the Inclosure Act then under discussion in the case of *Duke of Buccleuch* v. *Wakefield* (1)? or is he only entitled to work in such a way as not to let down the surface, as was held by the House of Lords fourteen years later under the Inclosure Act then under discussion in the case of *Love* v. *Bell* (2)?

It is now settled and undisputed law that where minerals are separated from the surface the mineral-owner is not entitled to let down the surface, unless by the deed, instrument, or Act of Parliament, by which the minerals are severed from the surface, it appears that the surface-owner has parted with the right of support, or, in other words, that the mineral-owner's right to get the minerals is limited to getting them in such a manner as not to occasion injury to the surface-owner, which is the same thing:

(1) Law Rep. 4 H. L. 377. (2) 9 App. Cas. 286.

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see per Baggallay, L.J., *Bell* v. *Love* (1), and the cases there cited, and also per Lord Blackburn in *Davis* v. *Treharne* (2); and this was not disputed at the Bar.

It was said, however, on behalf of the defendant, that the Inclosure Act of 1773 did give to the Lords Bishops of Durham the right to let down the surface, the compensation therein stipulated being paid for so doing. It was pointed out by Lord Selborne in *Love* v. *Bell* (3) that the person who made such a claim had the burden of proof thrown upon him, and that he did not satisfy such burden *merely* by shewing that there were words, however large, applicable to the right of working and privileges connected with it, and compensation to be paid for working and for the use of those privileges, which might receive full effect consistently with the right of support.

No one denies that the Bishops of Durham had and have the right to work the mines and minerals under the land in question; the point is, are they entitled to work them so as to let down the surface? Mr. Rigby for the defendant insisted that the reservation clause in the Act of 1773 of itself gives such right, and, if not of itself, that it certainly does so when coupled with the clauses for compensation. He says: "Besides the general rights given to the Bishops, look at the absolute right given to them to work all quarries and to erect buildings, and so on. How can it be contended," says he, "that whereas the Bishops may actually work all quarries, and build whatever buildings they may desire, and thereby permanently destroy or utilise for their own purpose the surface, yet that they may not let it down, an insignificant matter," he says, "in comparison to actually taking away and using the surface by quarrying and perpetually occupying the surface by buildings." It seems to me that the answer given by Malins, V.C., in *Wakefield* v. *Duke of Buccleuch* (4) is very apposite to this argument. The Vice-Chancellor, I am aware, in that case was overruled in the House of Lords. He, however, as to this point says: "There is this remarkable distinction between letting down the surface by mining operations—that the mining operations may go under

(1) 10 Q. B. D. at p. 558.
(2) 6 App. Cas. at p. 466.
(3) 9 App. Cas. at p. 289.
(4) Law Rep. 4 Eq. at pp. 653, 654.

the whole of the land, whereas a quarry is usually of very limited area. I cannot, therefore, consider the circumstance of the quarries being reserved as entitling the Duke of Buccleugh, if necessary, by mining operations to let down the whole surface of this land." In this remark I entirely agree, and I apply the same to the point taken about the buildings. Mr. Rigby further says that the Inclosure Act of 1773 enacts that the Bishops are to "enjoy all the mines and minerals as fully and freely as they might or could have had, held, used and enjoyed the same in case this Act had not been made, and that without paying any damages or making satisfaction for so doing." "Here," he says, "are the same powers reserved to the Bishops as they had before the passing of the Act, and at that date the Bishops could have worked the minerals, and let down the surface, for such in reality would have done no harm to the commoners, who only had limited rights of pasture over the commons and wastes."

To this I answer, a very similar claim was to be found in the case of *Duke of Buccleuch* v. *Wakefield* (1), and yet the Lord Chancellor (2) and Lord Chelmsford (3) in no way rely upon it as giving the Duke the right to let down, but on the contrary hold that the Act had created a different right in the lord over the inclosures from that which he previously possessed in relation to the wastes, and that what that right was must be determined by the Act itself.

Very ingenious arguments were addressed to us by the learned counsel on either side as to whether the present Act was more like the Act in the case of *Wakefield* v. *Duke of Buccleuch* (4) or like the Act in *Bell* v. *Love* (5), and various similarities and dissimilarities were pointed out and insisted upon, and it therefore becomes important to ascertain what was the real principle upon which, in the one case, the House of Lords held that the lord could let down the surface upon paying compensation, and in the other he could not.

It seems to me that the cardinal distinction between the one

(1) Law Rep. 4 H. L. at p. 383.
(2) At p. 395.
(3) At pp. 407, 408.
(4) Law Rep. 4 Eq. 613; reversed Law Rep. 4 H. L. 377.
(5) 10 Q. B. D. 547; affirmed 9 App. Cas. 286.

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case and the other is that in the *Duke of Buccleuch's Case* (1), as was stated by Lord Selborne, there was "an absolute and unqualified clause of compensation, so that, whatever might be the extent of the damage sustained, full reparation for that damage would be made to whoever might be the person who sustained it"; whereas there was no equivalent clause in *Love* v. *Bell*. (2)

Lord Watson in the same case says: the powers given in the case of the *Duke of Buccleuch* (3) "were made subject to the condition that those who worked the mines should make full compensation for all injury thereby occasioned to the owners of the surface. I concur," says Lord Watson, "in the opinion expressed by Mellish, L.J., in *Hext* v. *Gill* (4) that no one can read the judgment without coming to the conclusion that if the provision as to compensation had not been there the House of Lords, notwithstanding the strength of the other words, would in all probability have come to another conclusion." (5)

Lord Bramwell also lays great stress upon the inadequacy of the compensation clause in *Love* v. *Bell* (6) to compensate for the damage which it was asserted therein could lawfully be done by the lord.

I am fully alive to the other differences pointed out by Lord Selborne between the Act in *Love* v. *Bell* (7) and that in the *Duke of Buccleuch's Case* (3), but it seems to me that the radical distinction between the two cases is that in the one there was an absolute unqualified clause for compensation, so that, whatever might be the extent of damage, full reparation would be made to the person sustaining it, whereas in the other there was not.

What sort of compensation clause is there in the present case? Simply and solely this: in the first place the annual rental of 500 acres is set apart to provide for the compensation which the allottees might thereafter be entitled to. If and when that fails, then the deficiency is to be made up out of the pockets of the allottees by means of a rate levied upon themselves. What does this mean? I will test it. By the preamble to the Act of 1773

(1) Law Rep. 4 Eq. 613; reversed Law Rep. 4 H. L. 377.
(2) 9 App. Cas. at p. 296.
(3) Law Rep. 4 H. L. 377.
(4) Law Rep. 7 Ch. at p. 717.
(5) 9 App. Cas. at p. 298.
(6) 9 App. Cas. at pp. 301, 302.
(7) 9 App. Cas. 286.

it is stated that the moors, commons, or tracts of waste land in their then state are of little use or service, but considerable parts thereof are capable of cultivation and improvement. This applies I am told to some 20,000 acres of land. The annual rent of 500 of these acres is to be set apart for paying in the first place the compensation payable. If I put 5*s.* per acre as the rental value, (and from what I gleaned during the argument I have placed an ample rental value thereon), this makes a sum of 125*l.* a year to compensate for what may be the letting down of the whole of the allottees, as well as for the surface damage (i.e., spoil of ground) admittedly contemplated by the Act. Should such a letting down occur, how is the deficiency to be made up? For that there would be a deficiency is obvious; why out of the allottees' own funds. I have only to state the case to shew how utterly inadequate is the compensation. It seems to me but poor compensation for the allottees, after having been let down by the Bishop, to be told that for the major portion of the damage they will have to bear the loss themselves. Is this full reparation for the damage done, as in the *Duke of Buccleuch's Case*? (1) Certainly not. Moreover, in that case the damage was to be paid for by the person doing it; in this case, after the rental of the 500 acres has been exhausted, the persons damnified inter se are to make good the same, nor at any time is the person causing the damage to make it good. Sir Henry James, for the plaintiffs, made a remark which struck me. It was this: he said, if this Act contemplated the right to let down, was it not remarkable that some such word as "subsidence" or "letting down" or the like was not to be found in the Act, and he added, or in any other of the Inclosure Acts of about a century ago? In my judgment the Bishops have not established that the Inclosure Act of 1773 gave them the right to let down the surface of the Claverings' land, but on the contrary, I hold that upon the true construction of the Act they have no such right, and that this contention on their part fails.

Consequently if this action had been brought by John Clavering before he had sold his allotment, as he did, under compulsion, to the plaintiffs, this action in my opinion could have been maintained by him.

(1) Law Rep. 4 H. L. 377.

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Now arises the second point.

Is the waterworks company in a worse position when let down than the Claverings would have been?

It is contended by the company that this cannot be.

It is said whatever John Clavering had to sell the plaintiff company purchased; that John Clavering had the surface, *plus* the right to support, to sell, and that such right the plaintiff company purchased, and therefore are entitled to maintain this action.

Had the plaintiffs purchased of John Clavering otherwise than by compulsion under the Lands Clauses Consolidation Act, 1845, or, in other words, if the purchase had been voluntary, and not pursuant to statutable powers, this proposition in my judgment would have been correct.

Say the plaintiffs, "why then are we to be worse off than if we had not purchased by compulsion, and why is the defendant to be better off than otherwise he would have been? If we had purchased," say the plaintiffs, "as voluntary purchasers, we should have purchased *all* John Clavering's interest in the property, i.e., surface, *plus* right to support, and the defendant could not have worked the coal so as to let us down," and this is true. "Why then," it is asked, "is the defendant to be better off by being able now to work coal, which he otherwise would not have been able to do, and where has the right to support gone to if it it is not in us, the plaintiffs?"

To this it is answered by the defendant, it is too late to argue these points, because judicial authority has determined what is the position of a company purchasing under the Lands Clauses Act, coupled with the conjoint operation of the Railways Clauses Act, 1845 (1), and it is said that the plaintiff company, though a waterworks company, by reason of the Waterworks Clauses Act, 1847, when purchasing under the Lands Clauses Act by compulsion is in an exactly similar position.

It has been held by the highest authority that where a railway company compulsorily purchases from an owner who at the date of the notice to treat is owner both of the surface and the minerals thereunder, and the company gives no notice

(1) 8 & 9 Vict. c. 20.

to treat for the minerals, it purchases solely the surface, and obtains no right to support at all. This is settled law.

Again, it seems to me to have been decided by the Court of Appeal that where a company compulsorily purchases of a person who has leased the minerals to a lessee (it may be for 1000 years), so that at the date of the notice to treat the lessee has the right to the minerals, and not the vendor, the company purchases the surface only and no right to support at all. This is what was decided by the Court of Appeal in *Pountney* v. *Clayton*. (1)

Sir Henry James, however, on the part of the plaintiffs, denied that this was so when the surface and minerals were in different owners at the date of the notice to treat, and not merely under lease, "for," said he, "there was a reversion existing in the lessor in *Pountney's Case* (1), expectant upon the determination of the lease, which did not exist in the present case." This is so, but does this make any difference?

In *Pountney's Case* (1) the Master of the Rolls treats the lease as what it in reality was, viz. a sale by the lessor to the lessee of the minerals if there be time to get them. Bowen, L.J., also clearly deals with a case of the ownership of the surface and the ownership of the minerals being severed at the date of the notice to treat.

In my judgment the Court of Appeal decided in that case that where a railway company under compulsory powers only gives notice to treat for the surface, whether the surface owner and the minerals owner is the same or are different persons at the time, all the company under such a notice to treat takes is the land without the minerals, and, to use the words of the Master of the Rolls in that case, "the only right conveyed to them by the conveyance under the statute is one that gives them a right to all the land except the mines, and subject to this, that the mines may be worked against them to the utmost extent, even so that it may let down the railway, provided they are worked in the usual manner of working in the district." (2)

To answer Sir Henry James when he asked "where, then, in the present case has the right to support gone if my clients have

(1) 11 Q. B. D. 820, 832. (2) 11 Q. B. D. at p. 837.

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not got it?" I answer, exactly where it went to in the case of *Pountney* v. *Clayton* (1), i.e. not into the plaintiffs. The defendant is still under obligation to support the Claverings, but they, i.e. the Claverings, are not now in a position to demand it.

In my judgment, what the Master of the Rolls and Bowen, L.J., said and decided in *Pountney's Case* (1) concludes me in this, and although undoubtedly cogent suggestions are about to be put forward by my Brother Cave in his judgment in this case as to why it should be otherwise, in my opinion I feel bound by what has heretofore been stated and held, and that, at any rate in this Court, it is too late, and I am not permitted even to attempt, to decide otherwise.

It was then argued on behalf of the plaintiffs that they, being a waterworks company, did not stand in the same position as a railway company might have done, though they equally purchased under the compulsory powers of the Lands Clauses Consolidation Act, 1845, by reason of the Waterworks Clauses Act, 1847, being in some way different from the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20).

The sections in the Railways Clauses Act, 1845, which have been called a code of the rights of mine-owners within forty yards of the railway, are ss. 77, 78, and 79. The corresponding sections of the Waterworks Clauses Act, 1847, are ss. 18, 22, and 23. The sole distinction between the two sets of clauses is that in s. 23 of the Act of 1847 the words "as if this Act and the special Act had not been passed," are inserted, and it is argued that these words were purposely inserted to prevent a mine-owner working his minerals, which, be it remembered, have never been purchased, in a manner different from that in which he would have been able to have worked them had a railway company compulsorily purchased the surface, or, in other words, that though in the case of a railway company purchasing compulsorily the surface the mine-owner might let it down, in the case of a waterworks company he could not. I cannot hold that this is so. The reasons applicable to the section in the Railways Clauses Act, 1845, are forcibly given by the Master of the Rolls

(1) 11 Q. B. D. 820, 832.

in *Pountney* v. *Clayton* (1), and, in my judgment, are equally applicable to the case of a water company as to the case of a railway. Why, I ask, is it to be assumed that inasmuch as a railway company not paying for the minerals may be let down, a waterworks company equally not paying for them is to be supported? No good reason can be given. Moreover, as was pointed out by Mr. Rigby, the Waterworks Clauses Act, 1847, was passed only two years after the Railways Clauses Act, 1845, and in the interval no cases as to the right to support had come up for determination, and in my judgment the words have not the effect contended for, and as regards the right to support a railway company and a waterworks company, when they purchase compulsorily, are both identically in the same position.

My judgment, therefore, is that the Claverings had and still have the right to support from the Bishops of Durham, and the plaintiffs have not, and that the action fails, and judgment must be for the defendant, and with costs.

CAVE, J. There are two questions in this case. The first turns on the interpretation to be put on the Lanchester Common Act, and the other on the interpretation to be put on that part of the Waterworks Clauses Act which relates to mines lying under or near the waterworks.

On the first question I agree with my Brother Smith. We start with the admission that before the passing of the Lanchester Common Act the lords of the manor had no right to let down the surface of the common. It must therefore be made out to our satisfaction that the Act has given to the lord a right which did not previously exist. It is contended that this has been done by the sections to be found in pages 58 and 64 of the copy of the Act handed up to me. The section at page 58 is a long one, but I think that in effect it gives the lord power to work and enjoy his mines, minerals, and quarries as fully and freely as he could have had held, used, and enjoyed the same in case that Act had not been passed, and that without paying any damages or making any satisfaction for so doing. It seems impossible from this language to infer that the legislature intended to confer

(1) 11 Q. B. D. 820, 832.

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on the lord some right which he had not got before, especially as he is not to pay any damage or make any satisfaction. Mr. Rigby relied on the words empowering the lord to make all convenient ways, and for that purpose to remove fences, trees, or other obstructions. I think, however, that these words are merely intended to secure to the lord the same powers which he had before, notwithstanding the altered condition of the surface. Before the inclosure he could have made ways where he would, and these words reserve to him the same right, notwithstanding that in consequence of the inclosure fences might be put up, trees planted, or other obstructions erected by the allottees. So far as I am able to construe the language of that section I can find no intention to confer on the lord any power which he did not possess before the passing of the Act. Mr. Rigby also placed great reliance on the clauses (p. 60 et seq.) giving compensation to persons injured by the working of the mines. Now, where the Act is ambiguous as to whether the lord is or is not to have new rights which he did not possess before, the fact that he is to make full compensation to the surface-owner for all damage that may be done to the surface by the exercise of any of these rights is a good reason for giving the Act a wide construction, for it is more for the public advantage that the minerals should be got when the surface-owner is fully compensated for the loss he has sustained by their being got than that they should lie idle in the bowels of the earth because the surface-owner capriciously refuses to permit their being worked. But where the lord reaps the benefit, and the compensation is partial only, or not paid out of the pocket of the lord, the reason for construing the language of the Act benevolently towards the lord is gone. In this case the effect of the compensation clauses is such that all the benefits of letting down the surface would go into the pocket of the lord, and all the compensation would come out of the pockets of the surface-owners as a body, since it is only in his capacity as surface-owner of the lands allotted to him that the lord will contribute to the compensation. So far from leading us to find a meaning which is not apparent in the clause at p. 58, these compensation clauses ought to lead us to scrutinize very narrowly the powers conferred on the lord, as it is in itself highly

improbable that the legislature would confer on the lord a right he did not possess before on the terms that the compensation to be made to any surface-owner for damage sustained by the exercise of this new right should come out of the pocket, not of of the lord, to whom the right was given, but of the general body of surface-owners, at whose expense it was given. On the other hand, assume that no new right is given, but only the old rights confirmed and defined with reference to the change of circumstances arising from the inclosure, and everything then is plain sailing. These old rights had, previously to the inclosure, been exercised at the expense of the commoners generally because their interests were joint and not several. When, after the inclosure, their interests became several, the lord in working the mines might in the exercise of his rights inflict great damage on some particular surface-owner, and, under those circumstances, it was only reasonable that the legislature should compel the general body of the shareholders, by a kind of mutual insurance, to form a fund for the relief of an individual sufferer at the joint expense of the whole body.

With regard to the second point, after very much hesitation, and long consideration, I feel myself compelled to differ from my learned Brother. Previous to June 10, 1876, John Clavering was the owner of the surface of the soil afterwards conveyed to the plaintiffs, and was, if we are right in the previous part of our judgment, entitled to have his land supported by the subjacent and adjacent land and minerals. Sect. 18 of the Waterworks Clauses Act, 1847, did not apply, for John Clavering had no interest in the minerals, and no conveyance from him would, under any circumstances, give the plaintiffs any right to the mines or minerals under the land belonging to him, nor even to such parts thereof (if any) as were necessary to be dug or carried away or used in the construction of the waterworks. There was nothing therefore to preclude John Clavering from requiring to be compensated for the whole of his interest in the lands taken by the company, that is for the surface with a right to support. The lords of the manor, on the other hand, were not the absolute owners of the minerals, to do what they liked with them, but were bound not to remove them in such a way as to deprive the

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superjacent and adjacent surface of its support. Under these circumstances there is no express provision in the Act that the right of support which John Clavering then had should remain in him after his conveyance to the plaintiffs, or should, upon the execution of that conveyance, cease to exist for the benefit of the lords of the manor or their lessees. There is nothing in the Act to enable the former surface-owner to make any claim on the mineral-owners or their lessees when they give notice to work the mines, and if the surface-owner is not entitled to be compensated for the whole of his interest in the land, including the right of support, when the waterworks company purchase, I do not see how he is to get compensation at all. Sect. 22 of the Act undoubtedly applies to such a case as the present, and if on notice of intention to work the minerals being given the waterworks company determine to make compensation, on what basis is the compensation to be assessed? Is it to be assessed on the assumption that the mineral-owner can work his mines without leaving support for the surface, or on the assumption that he must leave such support? The difference may be very considerable. Thus in *Great Western Ry. Co.* v. *Bennett* (1) it was declared by the award that if Bennett was entitled to work out the whole of certain minerals under the railway the compensation would be 8649*l.* 10*s.*, but that if he was bound to leave reasonable support to the surface, the compensation would only be 1085*l.* 3*s.* 8*d.* In such a case as that why is the mineral owner to get this enormous advantage at the expense either of the waterworks company, if they have to compensate the surface-owner for his right of support, or of the surface-owner if he is not to get such compensation? Before June 10, 1876, the lords of the manor or their lessee were only entitled to such of the minerals as they could get without interfering with the support of John Clavering's land. Under what provision of the Act did they immediately on the execution of that conveyance become entitled to work the whole of the minerals? Sect. 22 of the Act provides that the waterworks company may, if they please, on receiving notice of the mine-owner's intention to work the mines, elect to give compensation to the owner, lessee, or

(1) Law Rep. 2 H. L. 27.

occupier, and then he shall not work the minerals. That the compensation to be given must be limited to the nature and extent of the owner, occupier, or lessee's interest is established by *Smith* v. *Great Western Ry. Co.* (1) If, as is there laid down, the lessee of the minerals gives notice of his intention to work the mines, the directors are to come to an agreement or settlement with him according to what his rights may be. If he has a tenure the length of which will enable him to take away the minerals and exhaust them entirely, the railway directors are bound to compensate him to an extent equal to the whole value of the minerals. If his right is not so great, if he cannot take away the whole, or if his tenure is not such as would enable him to take away the whole, the directors would have to compensate him to an extent less than the value of the whole, and if any other person has an interest in the minerals he also will be entitled to compensation in proportion to that interest. Now, it seems to me that the interest which under these clauses relating to mines is to be the subject of future compensation, and is to be excepted out of the grant to the railway company, or the waterworks company, is an interest in the minerals themselves. It is only where there are minerals under the railway or waterworks, in which the owner of the surface has an interest, that the railway or waterworks company are to be entitled to purchase the surface only, reserving his interest in the minerals for future compensation. Where the ownership of the surface and of the minerals has been severed, and the owner of the surface has no interest in the minerals, but only a right of support, he is exactly in the same position as an owner of lands in which there are no minerals. In such a case the owner is entitled to receive compensation for the full value of his interest at the time of the purchase by the railway or waterworks company, and not for the surface only excluding the right of support, and it seems to me to follow that John Clavering at the time of the sale to the waterworks company was entitled to and presumably got compensation for the whole of his interest, that is for the surface plus the right of support, and I see no machinery in the Act giving John Clavering any right to come upon the waterworks

(1) 3 App. Cas. 165.

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company and claim compensation for the right of support when the lessee gave notice to work the minerals under the waterworks. It would be altogether anomalous that John Clavering should have reserved to him at the time of purchase by the waterworks company such an interest as a right of support to the surface he was parting with, or that he should be at liberty to claim compensation for the loss of such a right when the lessee gave notice to work the minerals, seeing that if this right of support were reserved to Clavering he would not lose it as a consequence of the notice given by the lessee, who could only work the minerals to the extent to which he was entitled to work them before the sale to the waterworks company, that is to such an extent as would not interfere with the right of support to the surface. I think that any other conclusion would either give the owner or lessee of the minerals a right greater than he had before the purchase by the waterworks company, or would confer upon Clavering an interest in the minerals which he did not possess before he sold the surface.

It is said, however, that there is a decision of the Court of Appeal which concludes the point in favour of the defendants. That is the case of *Pountney* v. *Clayton* (1), and as that case is undoubtedly binding upon us it is important to see what is really decided by it. In *Pountney* v. *Clayton* (1) the railway company purchased the surface of the land from the owner, who was also the owner of the minerals beneath, which he had previously demised, reserving to himself however a right of support for the surface, which would necessarily prevent the lessee from getting the whole of the minerals. The owner of the surface therefore had an interest in the minerals over and beyond the interest of the lessee, which, as I have shewn from the award in the *Great Western Ry. Co.* v. *Bennett* (2), might possibly very much exceed in value the interest of the lessee. This therefore was a case in which the railway company could not be compelled to purchase, and did not purchase, the whole interest of the owner, who therefore, according to *Smith* v. *Great Western Ry. Co.* (3), was entitled to compensation from the railway company at some subsequent

(1) 11 Q. B. D. 820. (2) Law Rep. 2 H. L. 27.
(3) 3 App. Cas. 165.

period for his interest in the mines. If the railway company had in *Pountney* v. *Clayton* (1) constructed their line over the surface so purchased, and the lessee had given notice of his intention to work the mines, then, according to the decision in *Smith* v. *Great Western Ry. Co.* (2), the lessee would have been entitled to compensation for his interest in the minerals, and the lessor or reversioner for his interest, and if such compensation were refused by the railway company they could have taken the minerals, either singly and successively according to their respective rights, or by arrangement with one another at the same time. This is substantially all that was decided in that case, and I am unable to find anything in the judgment of the Master of the Rolls which is inconsistent with the view I take of this case. There is, however, an obiter dictum by Bowen, L.J., that even where the surface has previously been severed from the minerals, leaving the surface-owner with a right of support only and no interest in the minerals themselves, s. 79 of the Railways Clauses Act applies, and the Lord Justice further says that, as a consequence of the application of that section, if the railway company refuse to compensate the owner of the minerals for his interest, that is for the right to get the minerals leaving support for the surface, for that is all the interest he has, he is entitled to get them without leaving such support. I am unable to understand the reasons by which that view is supported. Sect. 79, read by the light of *Smith* v. *Great Western Ry. Co.* (2), gives the mineral-owner a right to compensation for his interest in the minerals according to the nature of his interest, and if the railway company do not make that compensation I do not see anything in that section giving the mineral-owner a larger right than he had before. Take the present case. Before the conveyance to the waterworks company the mineral-owner could only have worked his mines on the terms of leaving sufficient minerals to support the surface. According to *Smith* v. *Great Western Ry. Co.* (2) on his giving notice to the waterworks company they might have prevented his working the minerals by giving him compensation on the footing of his only being able to take such part of the minerals as would not interfere with the support of the surface.

(1) 11 Q. B. D. 820. (2) 3 App. Cas. 165.

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If such compensation is refused why is the mineral-owner to be entitled to take away the *whole* of the minerals? The Lord Justice says that s. 79 of the Railways Clauses Act applies to every owner or occupier of any mine within forty yards of the railway, and that you must cut down and alter the words of that section in order to deprive the owner of his liberty to work his mine. But it is not a case here of depriving the owner of his liberty to work his mine. It is not contended that the mine-owner is not at liberty to work his mine, leaving support for the surface, which was all that he could do before the purchase by the waterworks company, and I can find nothing in s. 79 giving the owner any greater right of working the mine than he had before. According to *Smith* v. *Great Western Ry. Co.* (1) he is to be compensated according to his interest in the minerals, and I cannot see why he is to be compensated on one principle, and, if compensation is refused, be permitted to work the mine on another principle, nor can I find any provision in the Act enabling the waterworks company in this case to purchase the surface only from John Clavering without paying for the right of support. If they are bound to pay Clavering, to whom it belonged, for the right of support, why are they to be deprived of it in favour of the owner of the minerals? A provision enabling the waterworks company to buy the surface from Clavering without the right of support, supposing such a provision to exist in the Act, would not, I think, entitle the mine-owner to take away the whole of the minerals. Suppose the mining owner to give notice of his intention to work the mines, and, on the waterworks company refusing to give compensation, to work and take away the whole of the minerals, what would be Clavering's position? The Act gives him no right of action in such a case against the mine-owner, and if he were entitled in such a case to claim compensation against the waterworks company the result would be that the waterworks company would have to pay compensation to Clavering for a right to support, of which the mine-owner had (rightfully according to the premisses) already deprived them. On the other hand, I see no difficulty in my view of the construction of the Act. The waterworks company when they purchase must buy

(1) 3 App. Cas. 165.

the surface from Clavering along with the right of support, just as they would have had to do if there had been no minerals beneath. The rights of the mine-owner will remain as they were before. If he gives notice to work the mines, he will either be entitled to compensation on the basis of his having to leave minerals sufficient to support the surface, which is what he had to do before the sale by Clavering to the company, or if compensation is refused he will be entitled to work his mines just as far as and no further than he could have done if Clavering had remained the owner of the surface. For these reasons I think that the obiter dictum of Bowen, L.J., cannot be supported to its full extent. It is admittedly contrary to the obiter dictum of Cockburn, C.J., in *Great Western Ry. Co.* v. *Fletcher* (1), and under these circumstances I conceive that I am at liberty to exercise my own judgment, which, it being admitted for the purposes of this argument that the weight of the water in the reservoir did not cause or contribute to the subsidence, is in favour of the plaintiffs.

The Court being divided, my Brother Smith withdraws his judgment to enable the case to be taken to the Court of Appeal, and consequently the judgment of the Court will be for the the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Harvey & Capron, for H. Marshall, Durham.*

Solicitors for defendant: *Crossman & Prichard, for Philipson, Cooper, & Goodger, Newcastle-upon-Tyne.*

P. B. H.

(1) 5 H. & N. 689, at p. 698.

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Jan. 23, 28.

[IN THE COURT OF APPEAL.]

EDWARDS *v.* THE VESTRY OF ST. MARY, ISLINGTON.

Metropolis Management Acts—18 & 19 *Vict. c.* 120, *s.* 116—25 & 26 *Vict. c.* 102, *s.* 106—*Notice of Action—Metropolitan Vestry—Negligence.*

The plaintiff was a driver employed by contractors who had contracted with the defendants, a metropolitan vestry, to provide them with horses and drivers for their carts used in watering the streets under the powers of 18 & 19 Vict. c. 120. The defendants negligently supplied a cart with a defective axle, and by reason thereof the plaintiff, whilst driving the cart for the purpose of watering the streets, was thrown off and injured:—

Held, that the defendants were entitled to notice of action under 25 & 26 Vict. c. 102, s. 106, because the supply of the water-cart to the plaintiff for the purpose of watering the streets was a thing "done or intended to be done" under the powers of the vestry under the Act empowering them to water the streets.

APPEAL from a decision of Grantham, J.

The action was to recover damages for injury sustained by the plaintiff through the defendants' negligence. The defendants had contracted with Irons & Co. to provide horses and drivers for the water-carts used by the defendants to water the streets, under the powers of 18 & 19 Vict. c. 120. The plaintiff was one of the drivers employed by Irons & Co., and whilst driving a water-cart supplied by the defendants the axle broke, and the plaintiff was thrown off the cart and injured.

The action was tried with a jury, and there was evidence on behalf of the plaintiff that the axle broke through a defect in its condition which might have been ascertained by inspection.

The learned judge left to the jury the question whether the defendants were guilty of such negligence as would entitle the plaintiff to recover.

The jury found a verdict for the plaintiff, damages 100*l.*

The learned judge entered judgment for the defendants on the ground that no notice of action had been given to them, nor had the action been commenced within six months next after the accrual of the cause of action, so as to satisfy the requirements of s. 106 of 25 & 26 Vict. c. 102. (1)

(1) No writ or process shall be sued out against or served upon, and no proceeding shall be instituted against the Metropolitan Board of Works, or any vestry or district board, or their clerk, or any clerks, surveyor, contrac-

The plaintiff appealed.

Ellis Davis, (*J. M. Stevens*, with him), for the appellant. No notice of action was necessary in this case. The action was not brought in respect of anything done or intended to be done under the powers of 18 & 19 Vict. c. 120, s. 116, by which the defendants were empowered to water the streets. They may water them in any way they choose, and are not bound by the statute to use a cart. The accident happened because they chose to use their own cart and kept it negligently. The plaintiff's cause of action was founded on their common law liability to keep the cart, which was to be used by others, in proper repair. There was no breach of any duty cast upon them by statute. *Whatman* v. *Pearson* (1) is directly in point. There, as in this case, the action was for negligence in not attending to the cart, and the Court held that the defendants were not entitled to notice of action. In all the cases in which notice has been held necessary there was something done directly under the powers of the Act.

J. V. Austin, (*Waddy*, *Q.C.*, with him), for the respondents. The defendants were entitled to notice of action under 25 & 26 Vict. c. 102, s. 106. This case is distinguishable from *Whatman* v. *Pearson*. (1) There the action was against the contractor, not against the board, and he is only liable whilst acting, by himself or his servant, under the Act. When the facts of that case are looked at it is clear that the negligence was wholly collateral. In the present case the action is brought against the vestry, who have a statutory duty cast upon them to water the streets. They must employ some means—whether by using carts or otherwise—in order to perform that duty, and by using water-carts they were acting under the powers of the Act. The negligence, if any, of

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tor, officer, or person whomsoever, acting under their or any of their directions, for anything done or intended to be done under the powers of such board or vestry under the said Acts (the Metropolis Local Management Acts), or this Act, until the expiration of one calendar month next after notice in writing shall have been served upon such board or vestry . . . and every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards.

(1) Law Rep. 3 C. P. 422.

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their servants in respect of keeping the water-carts is something done or intended to be done under the powers of the Act within the meaning of 25 & 26 Vict. c. 102, s. 106. [He cited *Holland* v. *Northwich Highway Board.* (1)]

Cur. adv. vult.

Jan. 28. LORD ESHER, M.R. This case was tried before Grantham, J., and a jury. It was an action for damages for injury sustained by the plaintiff through the breaking down of a water-cart which he was driving. He was the servant of a firm of contractors, who had contracted with the defendants, a metropolitan vestry, to find horses and drivers for their water-carts used for the purpose of watering the streets. The axle of the cart broke and caused the injury complained of. The jury found a verdict for the plaintiff on the question left to them. They must be taken to have found that the defendants had been guilty of negligence in respect of the defective condition of the cart and axle which they supplied. It was contended on behalf of the defendants that they were entitled to notice of action, and to have the action brought within six months under the provisions of 25 & 26 Vict. c. 102, s. 106. The learned judge ruled that they were so entitled, and gave judgment for them accordingly.

The question is whether, by the terms of the Act, and upon the facts which I have stated, the defendants were entitled in respect of those two matters. By the terms of the Act they are entitled to notice of action or to have the action brought within the specified time if the cause of action was for anything "done or intended to be done" under the powers of the vestry under the Act (18 & 19 Vict. c. 120), which gave them power to water the streets, and we have therefore to consider whether that which has been found against them was something done or intended to be done under the powers of the Act. The statute, 25 & 26 Vict. c. 102, assumes that the thing in respect of which notice is necessary has been badly done. It applies to cases in which there is a right of action against the vestry. During the argument we were invited to consider the object of

(1) 34 L. T. Rep. 137.

the legislature in giving the vestry the right to have notice of action. In my view it is immaterial what that object was. We must construe the words used, and consider whether the injury to the plaintiff was the consequence of something which is brought within those words. The cause of action was the supply to the plaintiff of a water-cart in an inefficient condition. The injury to the plaintiff was the direct consequence of supplying it in that condition. I think that the supply of it was an act done and intended to be done under the powers of the Act. The vestry had no power either to supply the cart, or to water the streets, except under the Act. In supplying the cart they were intending to act as a vestry, exercising the powers and performing the duties given to and imposed upon them by the Act. The cause of action, therefore, was in respect of something done and intended to be done under the powers of the vestry under the Act 18 & 19 Vict. c. 120. The vestry, therefore, were entitled to notice of action, and to have the action brought within the specified time. Those conditions not having been complied with, the learned judge was right in giving judgment for the defendants.

BOWEN, L.J. I am of the same opinion. The question is whether this accident, which, but for the provisions with respect to notice of 25 & 26 Vict. c. 102, s. 106, would give an ordinary right of action to the plaintiff, happened in consequence of something done or intended to be done under the powers of the vestry under the Act 18 & 19 Vict. c. 120.

I am of opinion that the cause of action was the supply to the plaintiff by the vestry of a cart having this uninspected and dangerous axle, followed by actual damage to him. The combination of those two things produced the cause of action. The action being brought by a servant in respect of an injury done to him by those who had contracted with his master, I think it is difficult to view the action as one brought for breach of any implied contract with respect to supplying the carts. It must be treated as an action founded on the breach of a duty by the vestry to supply the plaintiff with a water-cart reasonably safe and efficient for the purpose of watering the streets. I am of

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Bowen, L.J.

opinion that the action was for something done or intended to be done under the powers conferred upon the vestry by the statute. Sect. 116 of 18 & 19 Vict. c. 120, imposed upon the vestry, in common with many other duties, a duty to water the streets. But for the statute they had no power whatever to water the streets. It is clear that what they did was intended to be done under the statute. It was intended to be paid for out of the funds appropriated by statute to that purpose. We were asked to follow *Whatman* v. *Pearson* (1), but that case is entirely distinguishable. The action was against the contractor, not against the board. The negligence was the negligence of one of the servants employed by the contractor to cart away soil. Contrary to his instructions the servant went home, taking his horse with him, and leaving it in the street outside his house whilst he had dinner. The horse ran away and damaged the plaintiff's railings. The jury found, and the Court upheld the finding, that the servant was acting within the scope of his employment by the contractor. The contractor, therefore, in order to escape liability, had to prove that what was done was done under the powers of the board under the statute. The question was whether the servant was acting and intending to act in performance of some duty cast upon his master by the statute. The Court held that he was not so acting, but that what he did was wholly collateral, and not within the scope of any authority conferred by the statute. The distinction between that case and the present requires attention to the facts of each case, but, when observed, it is, I think, a substantial distinction.

I am, therefore, of opinion that judgment was rightly entered for the defendants in this case.

FRY, L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for appellant: *Hulbert & Crowe.*
Solicitor for respondent: *William Lewis.*

(1) Law Rep. 3 C. P. 422.

W. A.

[IN THE COURT OF APPEAL.]

1889
Feb. 6.

KAY *v.* BRIGGS.

Practice—Appeal—Jurisdiction—Appeals from County Courts—Leave to appeal—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 19, 45.

Where a Divisional Court has refused special leave to appeal, under s. 45 of the Judicature Act, 1873, from their decision given in an appeal from a county court, the Court of Appeal has no jurisdiction to hear an appeal from such refusal.

APPLICATION, ex parte, by way of appeal from the decision of a Divisional Court refusing leave to appeal.

Action for damages under the Employers' Liability Act, brought in the Bradford County Court.

The jury gave a verdict for the plaintiff, with damages. The defendant appealed to a Divisional Court on the ground that there was no evidence of any negligence which would render him liable, and the county court judge was wrong in leaving the case to the jury.

The Divisional Court (Lord Coleridge, C.J., and Hawkins, J.) allowed the appeal, and refused to give the plaintiff leave to appeal from their decision.

Joseph Walton, for the plaintiff, now asked for leave to appeal. The refusal of the Divisional Court to give leave to appeal can be reviewed by this Court, as it is a "judgment or order of the High Court" within the meaning of s. 19 of the Judicature Act, 1873. Sect. 45 of that statute does not take away the jurisdiction of the Court of Appeal to entertain such an application as this. *The Amstel* (1) was decided on different words occurring in s. 27 of 31 & 32 Vict. c. 71, and the decision is, therefore, not conclusive in the present case. [He also referred to *In re Gilbert*, *Gilbert* v. *Hudlestone*. (2)]

LORD ESHER, M.R. I am of opinion that the case of *The Amstel* (1) is really decisive against this application. The decision of the Court of Appeal in that case was given upon s. 27 of 31 & 32 Vict. c. 71, with respect to appeals to the High Court of Admiralty from decrees or orders of county courts exercising Admiralty jurisdiction. The provisions of that section are sub-

(1) 2 P. D. 186. (2) 28 Ch. D. 549.

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stantially to the same effect as those of s. 45 of the Judicature Act, 1873, with respect to appeals from county courts to the High Court, though the language of the earlier Act is somewhat weaker. The Court of Appeal held that they had no jurisdiction to interfere with the discretion of the judge of the Admiralty Court refusing to allow an appeal from a county court. Sect. 45 enacts that the determination of all appeals from the county court by the Divisional Court "shall be final unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court." If this Court could overrule the discretion given by that section to Divisional Courts the practical effect would be to allow an appeal here in every case, because the facts of each case would be brought before us in order to enable us to decide whether or not we ought to overrule that discretion. I think that the real meaning of s. 45 is to confine the power to give leave to appeal absolutely to the Divisional Courts. I am of opinion, therefore, that we have no jurisdiction to interfere with the exercise of their discretion.

FRY, L.J. I am of the same opinion. Sect. 19 of the Judicature Act, 1873, gives this Court jurisdiction to hear appeals from any judgment or order, "save as hereinafter mentioned," of the High Court. I think that one of the savings thereinafter mentioned is to be found in s. 45. By that section the decision of the Divisional Court is to be final except in one instance, namely, where special leave to appeal is given by the Divisional Court. If an appeal from the refusal of the Divisional Court to grant leave could be brought to this Court, our order would not satisfy the only contingency upon which the section provides that the decision of the Divisional Court shall not be final, because special leave to appeal would be given, not by the Divisional Court, but by this Court. The decision of the Divisional Court would cease to be final, although the contingency remained unsatisfied.

I am of opinion, therefore, that we have no jurisdiction to entertain this application.

Application refused.

Solicitor for applicant: *Futvoye, Field, & Baker, for Latimer Darlington, Bradford.*

W. A.

IN RE AUTHERS.

1889
Feb. 11, 23.

Licensing Acts—Selling Beer by retail without Licence—"Second Offence"—4 & 5 Wm. 4, c. 85, s. 17—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.

The manager of a club was duly convicted under s. 17 of 4 & 5 Wm. 4, c. 85, of selling beer by retail without having an excise retail licence. Subsequently he was convicted under s. 3 of the Licensing Act, 1872, of selling intoxicating liquor, to wit, beer, without a licence. Upon the hearing of the latter charge the magistrate treated it as a second offence, and imposed the full penalty of 100*l.* authorized in the case of "the second offence" by s. 3, sub-s. 2, of the Licensing Act, 1872:—

Held, that there could only be a conviction under s. 3 of the Licensing Act, 1872, for a second offence where the conviction for the first offence had been under the same statute, and that the second conviction was therefore bad.

MOTION to discharge a prisoner brought up on a writ of habeas corpus granted ex parte at chambers.

By 4 & 5 Wm. 4, c. 85, s. 17: ". . . . every person not being duly licensed to sell beer, cider, and perry as the keeper of a common inn, alehouse, or victualling house, who shall sell any beer, cider, or perry by retail to be drank or consumed in or upon the house or premises where sold, without having an excise retail licence in force authorizing him so to do . . . . shall forfeit twenty pounds . . . ."

By the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 3, ". . . . any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail . . . . shall be subject to the following penalties, that is to say,—

"(1.) For the first offence he shall be liable to a penalty not exceeding fifty pounds, or to imprisonment with or without hard labour for a term not exceeding one month.

"(2.) For the second offence he shall be liable to a penalty not exceeding one hundred pounds, or to imprisonment with or without hard labour for a term not exceeding three months, and he may, by order of the Court by which he is tried, be disqualified for any term not exceeding five years from holding any licence for the sale of intoxicating liquors."

The prisoner, Abraham Authers, who acted as the manager of a

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club, was duly convicted on March 28, 1888, under 4 & 5 Wm. 4, c. 85, s. 17, of having sold beer by retail to be drunk on the premises without having an excise retail licence, and was fined 20*l.*; the conviction was not appealed against. On November 21, 1888, the prisoner was charged under s. 3 of the Licensing Act, 1872, with having on October 28, 1888, unlawfully sold certain intoxicating liquor, to wit, one pint of beer, without being licensed so to do. The magistrate convicted the prisoner on this charge, and, treating it as a second offence within the meaning of s. 3, sub-s. 2, of the Licensing Act, 1872, sentenced him to pay a fine of 100*l.*, and in default to three months' imprisonment. The fine was not paid, and in default of distress the defendant was imprisoned. An appeal to quarter sessions was dismissed.

Jan. 11. *Abel Thomas*, for the prisoner. There was no power to convict of a second offence under s. 3, sub-s. 2, of the Act of 1872, for in order to justify such a conviction both the offences must be offences under that Act; the use of the definite article in the expression "the first offence" almost conclusively shews this. The two offences are not the same, although they are at first sight similar, and may be supported by the same evidence; the first offence was for selling without an excise licence from the Inland Revenue, which is a different offence from that of selling without a licence under the Licensing Act. There are many points of difference between the two Acts. That of 1834 relates only to the excise, and under it a defendant cannot give evidence on his own behalf, while in a prosecution under the Licensing Act of 1872 he is by s. 51, sub-s. 4, of the Act expressly enabled to do so. The wording of the respective sections creating the offences is different; and the penalties are different; under the Act of 1834 the penalty goes to the Inland Revenue, but under the Act of 1872 it is received by the clerk to the justices.

Poland, Q.C., and *Forrest Fulton*, contrà. The conviction was right. The offence created by the Act of William IV. was that of selling beer without a licence, and for some reason this provision was re-enacted by the Act of 1872, with heavier penalties

attached to the offence. The offence is the same under either Act, but the offender cannot be prosecuted under both, and the Commissioners of Inland Revenue had the choice of the Act under which they should proceed.

[LORD COLERIDGE, C.J. You must say that s. 3, sub-s. 2, is to be read as though the words were "the second offence under this or any other Act."]

Yes; the offender cannot be proceeded against under both Acts, but it is the same offence dealt with by both statutes.

Abel Thomas, in reply. The offender may for a second offence be disqualified for five years from holding a licence; the statute must therefore mean a second offence under this particular Act.

Cur. adv. vult.

Jan. 23. LORD COLERIDGE, C.J. I have had the opportunity of consulting my brother Hawkins about this case, and agree in the judgment which he is about to pronounce. I will therefore only say that I think the expression "the second offence" under s. 3, sub-s. 2, of the Licensing Act, 1872, can only mean a second offence under that Act. The punishment inflicted in the present case is one which can only be inflicted in the case of a second offence, and the offence charged not being a second offence under that statute, I am, upon this short ground, of opinion that the prisoner is entitled to be discharged.

HAWKINS, J. During the argument of this case I had some doubt whether the offences aimed at by the Acts of 1834 and 1872 respectively were not the same offence; but I have come to the conclusion that they are different offences, although they may be supported by the same evidence. The legislation on the subject of beerhouse licences is in fact greatly involved, and it is necessary to trace its progress with some care before arriving at a decision in the present case. By s. 1 of the Act of 1830 (11 Geo. 4 & 1 Wm. 4, c. 64), which was the first of the Beer-house Acts, it was enacted that it should be lawful for any person who should obtain a licence for that purpose under the provisions of that Act to sell beer, ale, and porter by retail in

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any house or premises specified in such licence. It is to be observed that under that Act the licence of the excise only was necessary, s. 2 of the Act providing for the granting of licences by the commissioners, while by s. 7 a penalty of 20*l.* is imposed upon those who sell beer without such licence. Then came the amending Act of 4 & 5 Wm. 4, c. 85 (under which the first of the convictions in the present case took place), which, after reciting that evils had arisen in the conduct of houses licensed under the previous Act, authorized the grant of licences for the sale of beer and cider not to be drunk or consumed on the premises where sold; nothing is here said about the necessity of obtaining a certificate from the justices. By s. 17 penalties are imposed on persons not duly licensed who sell beer, cider, or perry by retail, (the section says nothing about exposing for sale,) 10*l.* being the amount of the penalty if it is sold not to be drunk on the premises, and 20*l.* if to be drunk on the premises where sold. Under this Act the applicant was on March 28, 1888, duly convicted of selling beer without an excise licence, and was fined 20*l.*; no objection was ever raised to this conviction. In 1869 the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), was passed, which made a certificate of the justices a necessary preliminary to the granting of an excise licence for the sale of beer by retail, and in 1872 came the General Licensing Act (35 & 36 Vict. c. 94), which regulates the sale of intoxicating liquors, and which applies to beerhouses kept under excise licences. By s. 3 of this Act "any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquor at any place where he is not authorized by his licence to sell the same," is subject to certain penalties; in the case of a first offence to a fine of 50*l.* or one month's imprisonment; of a second offence to a fine of 100*l.* or three months' imprisonment; and of a third offence to a fine of 100*l.* or six months' imprisonment, while the offender may further be disqualified from holding any licence for the sale of intoxicating liquors for five years upon a second offence, and upon a third offence he may be absolutely disqualified for ever from holding such a licence. On November 21, 1888, the prisoner was convicted under s. 3 of that Act of having

unlawfully sold certain intoxicating liquor, to wit, one pint of beer, without being licensed so to do, and he was adjudged to pay a fine of 100*l*. As I have already said, he had been previously convicted under the Act of William IV. but he had never been previously convicted under the Act of 1872.

The question for our decision is whether the magistrate was justified in law in treating this latter offence as a second offence within the meaning of s. 3, sub-s. 2, of the Licensing Act, 1872; I think not. It is true that the facts necessary to support a conviction for selling without the excise licence are sufficient to support a conviction under the Act of 1872; but, granting this, the offences are not the same. In the one case, a man is prosecuted as an offender against the revenue laws; in the other, as an offender against a statute passed in the interest of order and sobriety, and for the regulation of houses in which intoxicating liquors are sold: the penalties imposed by the two Acts are also widely different. It follows also, if the magistrate was right in the present case, that a person convicted under 4 & 5 Wm. 4, c. 85, even if such conviction were before the passing of the Licensing Act of 1872, might for a first offence under that latter Act be convicted as for a second offence; a state of things which it is quite impossible to contemplate. And if he had been twice convicted under the Act of William IV. before the year 1872, his first offence under the Act of 1872 might be treated as a third offence, and he might be for ever disqualified from holding a licence. It strikes me, further, that where the legislature passes a statute and imposes a penalty of 50*l*. for a first offence, it must mean, in the absence of express words to the contrary, that the conviction for the first offence must be under that Act, and the second conviction under the same Act; if it were otherwise, it would be idle to introduce the warning of a lower penalty for the first offence, and to impose a higher penalty for the second. In order, therefore, to justify the infliction of the penalty for a second offence under the Act of 1872, both of the convictions must have been under that Act.

Reference has been made to the interpretation clause (s. 77) of the Act of 1872, in order to see whether the word "licence" has the same meaning in that Act as in the Act of William IV.

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Without referring to all the sections mentioned in that interpretation clause, it is sufficient to say that under the Act of 1872 a man may, without reference to the question of an excise licence, be convicted of the second offence of selling beer without the certificate of justices, while if he were proceeded against under the Act of William IV. the prosecution would have to prove the absence of an excise licence. The offences are indeed similar, but the question is whether they are the same; I have come to the conclusion that they are not the same, but different, and therefore that an offence under the Act of William IV. cannot be used against a man as a first offence so as to turn his first offence under the Act of 1872 into a second offence under that Act.

Then it is said that the defendant appealed to quarter sessions, and that the conviction was affirmed. This is true as a fact, but it puts the prosecution in no better position, for if the magistrate had no power to give himself jurisdiction by finding that there had been a first offence where there had been none, the justices could not give it to him.

I have had many doubts whether it was competent for us to go behind a conviction which had not been quashed upon certiorari or by any other process of law; but I have satisfied myself that we can go behind this conviction upon affidavits. There are two authorities, in the Queen's Bench and Exchequer respectively, which seem to be conclusive. (1) They were two cases of prosecutions of workmen for neglecting their duty to their employers, and in each of them there was a summary conviction; upon the argument of a rule for a writ of habeas corpus it was allowed to be proved by affidavits that the men were, as a fact, not in that particular employment, and, therefore, not subject to the jurisdiction of the justices, the ground of admission of the affidavits being that there was no evidence before the justices to justify a conviction. So, in the present case, the Court is at liberty to go behind the conviction and to receive affidavits, it not being a case of conflicting testimony, but one in which the magistrate has found a previous conviction when, in point of fact, there was

(1) It is assumed that the cases referred to by the learned judge are *In re Bailey*, 3 E. & B. 607, and *In re Baker*, 2 H. & N. 219.

none. For these reasons, I think that the prisoner is entitled to be discharged.

Prisoner discharged.

Solicitors for prisoner: *Riddell, Vaisey & Co., for J. H. Jones, Cardiff.*

Solicitors for prosecution: *Andrew & Co., for Wheatley, Cardiff.*

W. J. B.

DYSON, APPELLANT; MASON, RESPONDENT.

Jan. 28.

Inn — Offences — "Gaming" — Game of Skill played for Money — Suffering Gaming on Licensed Premises — Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 17.

The appellant, a licensed person, suffered a game of skill called "skittle pool" to be played for small stakes of money on a billiard table in the licensed premises:—

Held, that he could properly be convicted of suffering gaming under the Licensing Act, 1872, s. 17, sub-s. 1.

CASE stated under the Summary Jurisdiction Acts.

On October 26, 1888, the appellant appeared before a court of summary jurisdiction in the city of Norwich, upon a summons obtained by the respondent, an inspector of police, charging him with having suffered suffered gaming on licensed premises, contrary to s. 17 of the Licensing Act, 1872 (35 & 36 Vict. c. 94).

The appellant was a person duly licensed for the sale of intoxicating liquors by retail to be consumed in a house and premises in his occupation called the "Oak Shades" public-house, at Norwich, and he had a billiard table in the house.

On October 19, 1888, between four and five o'clock in the afternoon, two young men played on the billiard table several games of "skittle pool." One or two games were played for the stakes of threepence each (and a halfpenny each for the use of the table); the next game was played for the stakes of sixpence each, and a further game for the stakes of one shilling each.

The stakes were placed on the mantel-piece, and the money was taken by the winners, the money for the use of the table being taken by the billiard-marker.

A dispute about the play arose between the appellant and one of the players, and the appellant assaulted the player, and was

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subsequently convicted before justices, and fined for the assault. A copy of the rules of the game as played by the two young men was produced in court, and appended to the case.

[From the rules it appeared that "skittle pool" is a game of skill. Small white and black skittles are placed on the billiard-table, and the object of the player is to knock down, with his own ball after touching another ball, the white skittles. Each of the white skittles counts a certain number to the player who knocks it down, but if any player knocks down a black skittle he is out of the pool, and can only continue in it by "starring." The game is thirty-one, and the player who first scores that number wins the pool.]

The justices convicted the appellant, and inflicted a fine upon him, with costs.

The question for the opinion of the Court was whether playing "skittle pool" on a billiard table for money in places licensed for the sale of intoxicating liquors, as set out in the case, was "gaming" within the meaning of the Licensing Act, 1872.

If the Court were of opinion that the justices' decision was right the conviction was to stand; if of the contrary opinion the conviction to be quashed.

Poland, Q.C., and *Candy, Q.C.*, for the appellant. The question upon which the justices desire to have a decision is, whether billiards, pool, and similar games of skill can be played on billiard tables on licensed premises for small stakes without rendering the holder of the licence liable to be convicted under s. 17 of the Licensing Act, 1872, which enacts that "if any licensed person suffers any gaming or any unlawful game to be carried on on his premises," he shall be liable to a penalty, and to have the conviction marked on his licence. Billiards and pool are not unlawful games" within the meaning of any statute, nor by the common law: Bac. Abridg. tit. "Gaming" A. The distinction between such games and games of skill is clearly drawn in the preamble of 8 & 9 Vict. c. 109, which statute provides for the granting of licences to keep billiard tables. The legislature did not intend to make it an offence for the licensed person to allow lawful games of skill for reasonable stakes, according to the

player's means, to be played on his premises. The "gaming" aimed at must be something in the nature of what would constitute keeping a gaming-house.

The term "gaming" implies something which in its nature depends on chance, or in which chance is an element. That was Cockburn, C.J.'s opinion in *Bew* v. *Harston* (1), in which case he entertained serious doubts whether playing games of skill came within the term "gaming" in s. 17 of the Licensing Act, 1872. The justices ought to have stated in the case whether they found as a fact that which took place was gaming. It might be a question of degree, depending upon the amount staked and the means of the players. In the ordinary use of language no one would say that persons were gaming, who for recreation played billiards for some very slight stake, or a glass of beer, or on the usual terms that the loser should pay for the use of the table.

R. S. Wright, for the respondent. It is admitted that billiards and pool are lawful games; but the playing of any lawful game of skill for money or money's worth is "gaming" within s. 17, and renders the owner of the licensed premises liable to conviction under that section, though, of course, no offence is committed by the players themselves. The question has been often discussed, and, with the exception of the doubts expressed by Cockburn, C.J., in *Bew* v. *Harston* (1), the decisions are all one way. In *Reg.* v. *Ashton* (2) the licensed person was convicted under the repealed statute 9 Geo. 4, c. 61, of an offence—namely, suffering dominoes to be played—against the tenor of his licence, which forbade him to "suffer any unlawful games, or any gaming whatsoever" on his premises. The Court quashed the conviction on the ground that the offence was not made out by merely shewing that a game of dominoes was played. Lord Campbell, C.J., said: "The object of the statute was to prevent the contracting of bad habits by the practice of games, where money was staked, in public-houses. If money were staked that would be gaming, and then there might be a lawful conviction for allowing gaming in the house." In *Parsons* v. *Alexander* (3) the question was whether money won at billiards in a public billiard

(1) 3 Q. B. D. 454. (2) 1 E. & B. 286.
(3) 24 L. J. (Q.B.) 277.

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room could be recovered, and the Court held that it could not, being money due on a "gaming" contract within 8 & 9 Vict. c. 109, s. 18. Lord Campbell, C.J., said: "Billiards is a lawful game, but there may be gaming at a lawful game, and the evidence here shews that the money was lost by playing at billiards in the usual way, the players betting on successive games, and I take it that clearly is gaming." In *Patten* v. *Rhymer* (1) the offence was permitting card-playing contrary to the tenor of the licence under 9 Geo. 4, c. 61. Wightman, J., said: "The words 'any gaming whatsoever' are wide enough to prohibit gaming of every description. Playing cards for money is gaming, granting that under the circumstances of the present case the gaming was innocent;" and Crompton, J., said: "As my brother Wightman has pointed out, playing for money is gaming." In *Danford* v. *Taylor* (2) playing "ten-pins" for beer was held to be "gaming" within 9 Geo. 4, c. 61, s. 13, sched. C; and in *Luff* v. *Leaper* (3) playing skittles for beer was held to be "gaming" within the prohibition against permitting gaming in the appellant's licence. In *Bew* v. *Harston* (4) Cockburn, C.J., for the first time raised the point that there was no "gaming" where the game was a game of skill. The object of the statute was to prevent the playing of games for money on licensed premises, and that object applies to games of skill just as much as of chance.

[He also referred to *Hare* v. *Osborne* (5).]

HUDDLESTON, B. The question reserved for our consideration is whether playing "skittle pool" on a billiard table for money in places licensed for the sale of intoxicating liquors is "gaming" within the meaning of s. 17 of the Licensing Act, 1872. The game is a species of billiards. It is played with small skittles placed on a billiard table. It may be played by several persons, and may properly be described as a game of skill. It is just as much a game of skill as the game of billiards. When played for money each player stakes an agreed sum, and the winner takes the whole. In the present case it was played for money,

(1) 3 E. & E. 1.
(2) 20 L. T. (N.S.) 483.
(3) 36 J. P. 773.
(4) 3 Q. B. D. 454.
(5) 34 L. T. (N.S.) 294.

and whether the stakes were large or small seems to me immaterial. The justices have convicted the appellant under s. 17, which makes it an offence for a licensed person to suffer "any gaming or any unlawful game to be carried on on his premises." Now unlawful games are certain games specified by statute, and skittle pool is not one of them. Is the playing of skittle pool for money "gaming"? In *Bew* v. *Harston* (1) the Court differed in opinion as to what constituted "gaming" under the statute of 1872. Mellor, J., thought that playing any lawful game for money was gaming. Cockburn, C.J., thought there must be an element of chance in the game; but though he entertained grave doubts whether the statute applied to a game of skill, he did not dissent from the judgment of the Court affirming the conviction. His view on the construction of the statute is unsupported by any other authority. On the contrary, the authorities seem to be uniform in describing "gaming" as the playing of any game for money. In *Patten* v. *Rhymer* (2), both the judges who heard the case pointed out that playing cards for money was gaming. In *Danford* v. *Taylor* (3), and *Luff* v. *Leaper* (4), convictions for permitting gaming by allowing "ten-pins" and skittles to be played on licensed premises for money or money's worth were affirmed by the Courts. In *Reg.* v. *Ashton* (5) Lord Campbell said that playing dominoes for money would be "gaming," and his language is wide enough to cover any game, whether of chance or skill, played for money.

I am of opinion that playing skittle pool for money is gaming within s. 17 of the Licensing Act, 1872. The justices, therefore, were justified in deciding as they did, and the conviction must be affirmed.

WILLS, J. I am of the same opinion. We have to decide whether, under the circumstances stated in the case, the conviction ought to be upheld. I think the question upon which the magistrates really want our decision is whether playing a game of skill for money is gaming within s. 17 of the Licensing Act,

(1) 3 Q. B. D. 454.
(2) 3 E. & E. 1.
(3) 20 L. T. (N.S.) 483.
(4) 36 J. P. 773.
(5) 1 E. & B. 286.

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1872. It seems to me to have been held, and rightly held, that playing any game for money is gaming. That is so according to the ordinary use of language, and there are many authorities in support of the proposition. I am aware of the danger of laying down a rule which is to include every case, but I think that the state of circumstances must be very exceptional which would prevent playing any game for money from being gaming. The legislature have recognised that it is impossible to put down the practice of playing games for money. So far as regards the general public, that practice cannot be put down, but it is another matter when you come to deal with the class of licensed persons who have exceptional privileges. There are very good reasons for not allowing gaming to be carried on upon licensed premises. If games, whether of chance or skill, are allowed to be played for money, the tendency is to encourage the spending of money in drink. It is perfectly reasonable that the legislature should interfere to prevent that being done which is a certain encouragement to drinking, and frequently causes disputes to arise and assaults to be committed, as happened in the present case.

I am of opinion, both on the authorities and on the natural reading of the language of the Act, that this conviction was right, and should be affirmed.

Conviction affirmed.

Solicitors for appellant: *White & Co.*

Solicitors for respondent: *Sharpe, Parkers, & Co.*

W. A.

[IN THE COURT OF APPEAL.]

1889
Jan. 17.

LUCAS *v.* DIXON.

Sale of Goods—Memorandum in Writing—Memorandum after Action—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 17.

A note or memorandum of a contract for the purposes of the 17th section of the Statute of Frauds must, in order to be available in an action on the contract, have been in existence when the action was commenced.

APPEAL from the judgment of Stephen, J., at the trial of the cause without a jury.

The action was brought for the non-acceptance of goods on a contract coming within the 17th section of the Statute of Frauds. The plaintiff having made an application under Order XIV., r. 1, the defendant made an affidavit in opposition. At the trial the plaintiff relied on the affidavit so made as constituting a note or memorandum of the contract sufficient to satisfy the statute. The learned judge was of opinion that the terms of the contract sufficiently appeared in the affidavit to make it a note or memorandum, but that it could not be available to the plaintiff as it was not in existence when the action was brought. He therefore gave judgment for the defendant.

The plaintiff appealed.

A. Henry, for the appellant. A contract for the sale of goods is "allowed to be good" when the plaintiff proves his claim. It is immaterial when the evidence by which he supports it comes into existence. Although the contrary is now settled it appears to have been considered that a contract was void unless the terms of the statute were complied with: *Carrington* v. *Roots* (1); *Reade* v. *Lamb* (2), and *Bill* v. *Bament* (3), which might have been decided on that ground, is no authority against the plaintiff. There is here what amounts to a memorandum signed by the defendant, and the case is analogous to the cases in equity in which specific performance was enforced of a contract within the statute not in writing, where it was fully set forth in the bill

(1) 2 M. & W. 248. (2) 6 Ex. 130.
(3) 9 M. & W. 36.

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and confessed by the answer of the defendant: Story's Equity Jurisprudence, par. 755; *Spurrier* v. *Fitzgerald.* (1)

[He also referred to *Bailey* v. *Sweeting* (2), *M'Clean* v. *Nicolle* (3), and *Britain* v. *Rossiter.* (4)]

T. Willes Chitty, for the defendant. The reason for the equity decisions was not that the confession of the defendant amounts to a memorandum, but that unless he states that the contract is invalid by reason of the statute he must be taken to admit the agreement to be binding on him: *Cooth* v. *Jackson* (5); *Ridgway* v. *Wharton* (6); *Heys* v. *Astley* (7). The admission, whatever it is, must be before action: *Sievewright* v. *Archibald* (8); for there must be a complete cause of action when it is commenced, per Maule, J.: *Fricker* v. *Thomlinson.* (9)

LORD ESHER, M.R. I am of opinion on the facts that the contract in this case was for the purchase and sale of chattels to be delivered, and therefore that it was necessary for the plaintiff to shew, in the action he brought, that the Statute of Frauds had been complied with. I think he did shew that, after action, the defendant made an affidavit in which he set out the terms of the contract in such a manner as to constitute a signed memorandum of the contract. At the trial this affidavit was put in, and, if it was a sufficient memorandum, the question that arises is whether the plaintiff complies with the obligation on him by producing a memorandum signed after action brought. The argument against the plaintiff is that the 4th and 17th sections, although they use different words, ought to be construed in the same way, and that the 4th section has been construed in a series of decisions so as to shew that under that section it is not sufficient for the plaintiff to produce a memorandum signed by the defendant after action brought, and it is said that the same rule applies to the 17th section, because though the words are different their effect is substantially the same. The words of the 4th section are that no action shall be "brought" without a memorandum, which of

(1) 6 Ves. 548.
(2) 9 C. B. (N.S.) 843.
(3) 9 W. R. 811.
(4) 11 Q. B. D. 123.
(5) 6 Ves. 11.
(6) 3 De G. M. & G. 677.
(7) 9 L. T. (N.S.) 356; 4 De G. J. & S. 34.
(8) 17 Q. B. 103.
(9) 1 M. & G. 772.

itself would shew the necessity of the existence of the memorandum at the time the action is commenced. But then we find a series of authorities in the Chancery Courts. As to these it is suggested that the judges were not dealing with the construction of the statute, but only in certain cases not allowing the statute to be set up. I do not think that is the true view of the authorities. If the defendant demurred, and in his demurrer stated that there had been a contract which was of such a kind that, had it been in writing, it would have entitled the plaintiff to succeed, the defendant's demurrer was allowed. But if a bill is demurred to it is on the ground that it was not a good bill when delivered, so that in allowing a demurrer it must have been on the ground that the contract was not enforceable because the memorandum was not in existence at the time the action was brought. The case of *Wood* v. *Midgley* (1) was in the Court of Appeal, and it seems to me clear that Turner, L.J., decided the case on the construction of the statute on the ground that the evidence of the contract should be in existence at the time the action is brought, and if not so cannot be produced as evidence at the trial. If that is so as to s. 4, we then come to s. 17, which is worded differently. No contract is to be "allowed to be good." Do these words produce a different effect from those of s. 4? Let us look at the rest of the section and see what are the exceptions: "Except the buyer shall accept part of the goods so sold and actually receive the same." It is highly unlikely that it could have been imagined that a defendant disputing the contract should after action accept part of the goods. The clause is greatly in favour of the supposition that they were dealing with the state of things before the action. The same remark holds good as to the next clause, "give something in earnest to bind the bargain or in part payment." What was in the mind of the legislature was something to be done before action, and the same would seem to apply to the "note or memorandum to be made and signed by the parties to be charged." That is the conclusion I should come to on the words of the section; but then I come to the cases. In *Bill* v. *Bament* (2) Lord Abinger and Parke, B., clearly held this view. That case has never been overruled, but

(1) 5 De G. M. & G. 41. (2) 9 M. & W. 36.

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has been mentioned in subsequent cases as if it had been accepted, and it would be wrong that we should now differ from it. I come, therefore, on this ground also to the conclusion that the memorandum under s. 17 to support an action must be one in existence at the time when the action is brought. This appeal therefore fails.

BOWEN, L.J. I am of the same opinion. The question is whether there is a note or memorandum in writing sufficient to satisfy the Statute of Frauds, and the evidence in support of that view consists of an affidavit sworn by the defendant in opposition to an application under Order XIV. If this affidavit, which I will assume for the purpose of the argument contains sufficient evidence of the contract, had been sworn in some previous action and had been used in this, *Goode* v. *Job* (1) and *Barkworth* v. *Young* (2) shew that the document is not necessarily the less a sufficient memorandum because it is sworn in an action. What we have to consider is whether such a memorandum after action is sufficient in that action. I think the true view is that expressed by Lord Blackburn in *Maddison* v. *Alderson* (3): "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and 17th sections, is not to render the contracts under them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract." That still leaves it open to question as to what is the time at which it can be said the contract is sought to be enforced—when the action is brought, or when it is sought to prove the case by adducing the evidence. I cannot help thinking that the view of Lord Blackburn was that at the time the action is brought the evidence ought to be in existence, at all events in a contract under s. 4, because he speaks of a contract not being "enforceable" unless signed by or on behalf of the party to be charged.

But we must consider the matter partly on the statute and partly on the authorities. Looking at the statute itself it strikes one that it is for the prevention of fraud as well as perjury. It

(1) 28 L. J. (Q. B.) 1. (2) 4 Drew. 1.
(3) 8 App. Cas. 467, at p. 488.

may well be that though the contract may not be void, the legislature intended to prevent persons being vexed with actions that could not succeed. But when we come to s. 4, I cannot help thinking that it is perfectly clear that the memorandum or note must be in existence at the time the action is brought. That was the view taken by the Courts in Equity which had to deal with the 4th more perhaps than they had with the 17th section. I think it follows that was their view, because they allowed a bill, which shewed on the face of it that the conditions of the statute had not been complied with, to be demurred to, or, in other words, allowed a defendant to take by demurrer an objection to the institution of the action, which would shew that they thought that the matter could not be cured by evidence: *Wood* v. *Midgley*. (1)

It was held, no doubt, that if the defendant admitted his liability that was sufficient—not on the ground that his admission was a memorandum of the contract, but that it was an admission that there was such a memorandum. That is shewn by the fact that if, at the same time, he set up the statute his admission did not operate. So a plea of the statute was allowed, and as a plea goes to the state of things at the time of action brought that leads to the same conclusion. Then when we come to s. 17, is there any distinction in reason between the matters dealt with in the two sections so as to lead us to think that some different reasoning applies to them? The words are different, but in s. 17 one of the things for which a contract shall be allowed to be good is acceptance of part of the goods, which one would certainly expect to take place before action, and another is the giving of something in earnest to bind the bargain, to which the same remark applies. It is reasonable to suppose from this that the note or memorandum was to be something completed before action. Turning to the cases, the Courts have never drawn a distinction in this respect between the two sections, on the contrary, the general opinion expressed in the cases is that they are in pari materia.

There is a great deal of authority at common law that a memorandum coming into existence after action brought is not

(1) 5 De G. M. & G. 41.

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available to the plaintiff under s. 17. In *Fricker* v. *Thomlinson* (1) there was no decision, but Maule, J., expressed an opinion on the point. In *Bill* v. *Bament* (2) the point was made which is sought to be argued in the present case, but it was abandoned, or at all events treated as untenable, because the counsel on the other side were stopped. Lord Abinger thought it too untenable to require discussion, and Parke, B., said: "There must, in order to sustain the action, be a good contract in existence at the time of the action brought; and to make it a good contract under the statute, there must be one of the three requisites therein mentioned."

There is thus distinct authority, forty-seven years old, and, so far as I know, not questioned, but acted on and treated as binding, and though it may appear a technical point, I should hesitate to do anything to disturb a rule laid down about the Statute of Frauds and acted on for so long. It is said that at that time the Courts were of opinion that for want of a memorandum the contract was void, but I cannot agree that that was the case. There are many instances to the contrary. Thus in *Bailey* v. *Sweeting* (3), Williams, J., says: "A memorandum given after action brought will not do," and adds, "the reason given is that the cause of action is not complete until the memorandum is given," and the learned judge repeats in his judgment what he had said in the course of the argument: "The effect of that enactment is that, although there be a contract which is a good and valid contract, no action can be maintained upon it if made by word of mouth only, unless something else has happened, e.g., unless there be a note or memorandum in writing of the bargain signed by the party to be charged. As soon as such a memorandum comes into existence the contract becomes an actionable contract." In *Gibson* v. *Holland* (4) *Bill* v. *Bament* (2) was cited by Willes, J., and treated as binding law. At an earlier date, in *Sievewright* v. *Archibald* (5), similar language was used by Erle, J. The matter comes to this, that in no case has it been said that a memorandum made after action is sufficient, but that *Bill* v.

(1) 1 M. & G. 772.
(2) 9 M. & W. 36.
(3) 9 C. B. (N.S.) 843.
(4) Law Rep. 1 C. P. 1.
(5) 17 Q. B. 103.

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Bament (1) says the contrary, and has been followed by several cases and accepted by the text-books until the last edition of Mr. Benjamin's work on the Sale of Personal Property (2), which seems to suggest something in Lord Blackburn's judgment in *Maddison* v. *Alderson* (3) to a contrary effect. I do not think that suggestion is warranted by anything in that judgment, and on the whole, though feeling that the objection is technical, I have come to the conclusion that the plaintiff was not entitled to succeed, and that the learned judge was right.

FRY, L.J. I am of the same opinion, and for the reasons that have been so fully gone into. I will only add this observation, that the conclusion at which we have arrived is a somewhat singular one. The statute requires the memorandum as evidence, but requires that evidence to be in existence at the commencement of the action which is brought to enforce the contract. If, then, it only comes into existence after the commencement of such an action, and the plaintiff desires to avail himself of it, he can only do so by discontinuing the action and commencing another.

Appeal dismissed.

Solicitor for plaintiff: *Ralph Thomas.*
Solicitor for defendant: *Walter Stocken.*

A. M.

(1) 9 M. & W. 36. (2) 4th Ed. p. 192, n. (*i*).
(3) 8 App. Cas. 467, at p. 488.

1889
Jan. 29;
Feb. 4.

[IN THE COURT OF APPEAL.]

HUGILL AND ANOTHER *v.* MASKER AND ANOTHER.

Sale of Goods—Factors Act, 1877 (40 & 41 *Vict. c.* 39), *s.* 4—*Vendee in possession of Document of Title—Statute of Frauds*, *s.* 17.

The Factors Act, 1877, s. 4, provides that, where any goods have been sold or contracted to be sold, and the vendee obtains the possession of the documents of title thereto from the vendor, any sale, pledge, or disposition of such goods or documents by such vendee so in possession shall be as valid and effectual as if such vendee were an agent or person entrusted by the vendor with the documents within the meaning of the principal Acts as amended by the Act itself, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods.

It is not necessary, in order that the above-mentioned section should be applicable, that there should be a memorandum of the contract for sale of the goods so as to satisfy the Statute of Frauds; it is sufficient that there should be a de facto contract for sale, the vendee under which has obtained from the vendor possession of the documents of title to the goods; and a sale by such a vendee will give to a bonâ fide purchaser without notice a good title to the goods, free from any lien or other right of the original vendor in respect thereof.

APPEAL of defendants from the judgment of Charles, J., at the trial without a jury.

The action was brought in respect of the detention by the defendants of certain goods, viz., two machines called cap frames, and the facts, so far as material to this report, were in substance as follows. The machines in question had been purchased by the defendants from the executors of one Buckley. A person named Crossland called on the defendant Masker, and stated that he was a partner in a firm of manufacturers requiring machines of the kind, and was desirous to negotiate for the purchase of the machines; and a bargain was eventually made by word of mouth for the sale by the defendants to him of the machines, which still remained on the premises of Buckley's executors, for the sum of 82*l.* 10*s.*, to be paid down in cash. The defendant Masker gave Crossland a delivery order for the machines addressed to Buckley's executors, directing them to deliver the machines to bearer. Crossland then felt in his pocket and said that he had forgotten his cheque-book, but that he would send a cheque for the price of the machines the same

night or before noon the next day, and that the defendants would be all right, because, if they did not get the cheque, they could prevent the goods going away. An invoice of the machines had been made out by the defendant Masker, and handed to Crossland, but it was given back to Masker on Crossland's not being able to give a cheque for the price. One of the questions raised in the case was whether such invoice was a sufficient memorandum of the terms of the agreement for sale to satisfy the 17th section of the Statute of Frauds, but, as will be seen hereafter from the judgment, that question ultimately became immaterial; and it is therefore unnecessary to set out the terms of such invoice. Crossland, who was allowed to take away the delivery order, subsequently sold the machines to the plaintiffs, a firm of manufacturers, who required such machines in their business, for the sum of 50*l.*, of which 25*l.* was paid down, and the balance was to be payable after delivery of the machines. He handed the delivery order upon such sale to the plaintiffs. Crossland never paid the defendants for the machines, and it was admitted that the transaction was fraudulent on his part. The defendants directed Buckley's executors not to deliver up the machines to the plaintiffs, who had consequently been unable to obtain possession of them. The learned judge found on the facts that the plaintiffs were bonâ fide purchasers, and had no notice of any fraud, or of any lien or right of the defendants in respect of the goods. It was contended for the plaintiffs that they were entitled to the property in and possession of the goods notwithstanding any defect in Crossland's title by virtue of the 4th section of the Factors Act, 1877 (40 & 41 Vict. c. 39 (1)), Crossland having obtained possession of the delivery order, which was a document of title,

(1) That section enacts that "where any goods have been sold or contracted to be sold and the vendee, or any person on his behalf, obtains the possession of the documents of title thereto from the vendor or his agents, any sale, pledge, or disposition of such goods or documents by such vendee so in possession or by any other person or agent entrusted by the vendee with the documents within the meaning of the principal Acts as amended by this Act, shall be as valid and effectual as if such vendee or other person were an agent or person entrusted by the vendor with the documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods."

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from the defendants as a vendee of the machines, and they having purchased the machines from him bonâ fide and without notice of any lien or right of the defendants.

It was contended for the defendants (inter alia) that, there being no sufficient memorandum of the contract for sale of the goods to Crossland to satisfy the 17th section of the Statute of Frauds, there was no valid sale or contract for sale of them to him, and therefore the above-mentioned section did not apply: and that the property in the goods remained in them, or at any rate they had a lien on them. (1)

The learned judge held that the invoice was a sufficient memorandum of the contract to satisfy the Statute of Frauds, and, that being so, that the 4th section of the Factors Act, 1877, applied; and he accordingly gave judgment for the plaintiffs for the goods or their value.

Waddy, Q.C., and *Cyril Dodd*, for the defendants. The agreement between the defendants and Crossland being for cash, and payment not being made, there was no actual sale of the goods: even if there were, the defendants would have a lien for the price.

[BOWEN, L.J. The 4th section of the Factors Act, 1877, applies to the case of "goods contracted to be sold" as well as that of goods sold.]

By the terms of the 17th section of the Statute of Frauds, the contract is not to be allowed to be good unless the requirements of the section are satisfied. The existence of a contract of sale between the defendants and Crossland is the basis of the title of the plaintiffs. The applicability of the 4th section of the Factors Act, 1877, depends on the goods having been sold

(1) Only so much of the contentions of the parties and arguments is given as relates to the points here reported. Various points were raised in the argument which depended on the view taken as to the proper inferences of fact to be drawn from the circumstances of the case. The statement of the facts made above briefly states the facts in accordance with the view taken of their effect by the Court, and so much of the argument as is by such view rendered immaterial is omitted: and also the argument on the question whether the invoice above-mentioned was a sufficient memorandum of the contract to satisfy the Statute of Frauds, which is rendered immaterial by the judgment.

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or contracted to be sold by the defendants to Crossland, and if there was no legal contract for sale the section cannot apply. It is contended that, even if the Factors Act, 1877, applies, the defendants are entitled to a lien on the goods for their unpaid purchase-money, and, if not for the whole of it, then to a lien to the amount of 25*l.*, the unpaid balance of the purchase-money of the machines under the contract between Crossland and the plaintiffs.

[FRY, L.J. On what principle can any lien under the contract between the defendants and Crossland be transferred to the contract between Crossland and the plaintiffs?]

For this purpose Crossland must be treated as the defendants' agent, and they would be entitled to all rights he would have under the contract with the plaintiffs.

[LORD ESHER, M.R. There does not appear to be any lien under that contract. The delivery order was handed over to the plaintiffs.

BOWEN, L.J. Is not the principle of the 4th section of the Factors Act, 1877, that the case is to be treated as if the vendee were an agent entrusted with the goods?]

It is contended that no further effect must be given under the 4th section to the fraudulent sale of the goods by the vendee than is necessary to protect the innocent party who has bought on the faith of the documents of title, and therefore that he ought only to have the goods on condition of paying the price. (1)

Forbes, Q.C., and *Coppock*, for the plaintiffs. It is sufficient in order to render the 4th section of the Factors Act, 1877, applicable that there should have been an obtaining of the possession of the documents of title by a person in the character of a vendee under a de facto contract for sale. It is clear that, if the

(1) It should perhaps be mentioned that there was a counter-claim by the defendants against the plaintiffs for 25*l.*, the unpaid balance of the purchase-money of the machines under the contract for sale to the plaintiffs by Crossland, with regard to which considerable discussion took place during the argument. It became, however, unnecessary to decide anything with regard to that part of the case, because it was ultimately agreed between the counsel for the parties during the argument that the plaintiffs, if the judgment were for them, on obtaining possession of the machines, would pay the sum of 25*l.* to the defendants on their indemnifying the plaintiffs against any possible claim for it by Crossland.

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Factors Act, 1877, applies, any lien the defendants might have under the contract with Crossland was gone. There was no lien under the contract between Crossland and the plaintiffs for the unpaid balance of the purchase-money under that contract. Inasmuch as that balance was only to become payable after the delivery of the goods, it is clear that its payment cannot be a condition of their delivery.

Dodd, in reply.

LORD ESHER, M.R. We will reserve the questions with regard to the Statute of Frauds for further consideration.

Subject to those questions, Crossland was a person to whom these goods were contracted to be sold, and one of the defendants, the vendors, intentionally delivered to him a delivery order, which is a document of title, and allowed him to take it away. He was therefore, subject to the questions reserved, a vendee who had obtained possession of a document of title to the goods sold. By the Factors Act, 1877, a person who has so obtained possession of a document of title is placed in the same position as an agent or person entrusted with the document within the meaning of the previous Factors Acts. By means of the delivery order Crossland subsequently sold the goods to the plaintiffs for the sum of 50*l.*, of which 25*l.* only was paid down, and the remainder was to be payable after delivery of the goods. Under these circumstances, it appears to me that, apart from the Statute of Frauds, the plaintiffs having purchased bonâ fide from a vendee who had obtained possession of a document of title are within the protection of the 4th section of the Factors Act, 1877. It was argued that the non-payment of the remaining 25*l.* out of the 50*l.* is fatal to the plaintiffs' claim to the possession of the goods, because the defendants have a lien to that extent. It seems to me clear that the plaintiffs, if they bring themselves within the Factors Act, are not affected by any lien the defendants might have had against Crossland. It was suggested that, even if the plaintiffs were persons who had bought goods under the protection of the Factors Act, part of the price of such goods not having been paid to their vendor, the defendants, the original vendors, can refuse to deliver up the goods, unless the plaintiffs

pay to them so much as is unpaid of the price at which they purchased. But to say that the plaintiffs must pay that sum as a condition of delivery of the goods seems to me impossible, for I think that is really the same thing as asserting pro tanto the lien of the defendants which, as I have already said, is ousted by the operation of the Act. Under these circumstances it appears to me that on all points except those with regard to the Statute of Frauds, on which we have reserved our judgment, the appeal fails, and the plaintiffs are entitled to our judgment.

BOWEN, L.J. I am of the same opinion. The plaintiffs, having purchased bonâ fide without notice of any fraud, claim to be within the 4th section of the Factors Act, 1877, on the ground that they so purchased from a vendee who had obtained possession from the vendors of a document of title to the goods; and they allege that under those circumstances the section gave to such vendee power to convey a good title to the goods to them as such bonâ fide purchasers. I agree, for the reasons given by the Master of the Rolls, that, subject to the points reserved for consideration, the Factors Act, 1877, applies, and that Crossland, when he obtained possession of the delivery order, was placed by that enactment in as effective a position for dealing with the goods for commercial purposes as if he had been an agent entrusted with a document of title under the previous Factors Acts. It was suggested that the vendors' lien of the defendants still subsisted notwithstanding the sale by Crossland to the plaintiffs, but the very point of the enactment of the Factors Act is that the person who has obtained possession of documents of title as vendee shall be able so to deal with the property as to oust any lien of his vendors. It may be that the vendors might be entitled to the benefit of any lien existing under the contract of sub-sale, but the point does not arise, because the goods were sold by Crossland to the plaintiffs without any lien for the price.

FRY, L.J., concurred.

Feb. 4. The following judgments were delivered:—

LORD ESHER, M.R. I am of opinion that it is not necessary that there should be a memorandum in writing of the contract

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of sale in order that the 4th section of the Factors Act, 1877, may apply. That being so, the question whether there was in this case a sufficient memorandum falls to the ground. I come to this conclusion for the following reasons. The section does not deal with any question of proof or procedure at a trial; it deals with what mercantile men are entitled to do and to assume in the course of business under certain circumstances, and is settling what their rights are to be under such circumstances quite irrespective of all questions with regard to any action on the contract or to any trial. Looking at the section from that point of view, I find it worded thus. It speaks of the case "where any goods have been sold or contracted to be sold and the vendee, or any person on his behalf, obtains the possession of the documents of title." I think those words mean only that there must have been a contract of sale in fact and a vendee in fact to whom, under the contract the property passes, or to whom it is intended that the property in the goods shall eventually pass. The legislature have not said that the contract must be in writing. It is to be observed that the section is not dealing with the rights of the parties to that contract as against each other, but with the rights of third persons who enter into another transaction on the faith of the possession which the vendee under that contract has obtained of the documents of title. The case contemplated appears to me to be that in which there has been in fact a contract for the sale of goods, and the purchaser has obtained from the vendor possession of the documents of title to such goods, in which case the rights of third persons who have dealt on the faith of such possession are made to depend on the sight of the documents in the hands of the person to whom the vendor has in fact contracted to sell, and to whom he has given possession of the documents. To construe the section as importing the necessity for a contract in writing which would satisfy the Statute of Frauds, would be, I think, to do away with the mercantile effect of it, and to take away the protection which it was intended to afford, to a very great extent. It never can have been intended that a person purchasing on the faith of documents of title in the hands of a vendee should be bound to inquire whether the contract for sale was in writing, or to examine the

contract if in writing to see whether it complies with all the requirements held necessary under the Statute of Frauds. For these reasons I think that it was not necessary for the plaintiffs to shew that there was a sufficient memorandum in writing of the contract for sale to Crossland, but it was sufficient to shew that there was in fact such a contract for sale. Therefore the appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. I do not think that it was necessary, in order that the 4th section of the Factors Act, 1877, should apply, that the contract for sale to Crossland should be in writing. The contract was, no doubt, for sale of goods of such a value as would bring the case within the 17th section of the Statute of Frauds if that section applied. I think that that section really deals rather with procedure than with the actual contractual rights of the parties in cases where no question of procedure comes into play. Contracts are often made in fact by word of mouth in cases to which the 17th section of the Statute of Frauds would apply, and in many and many a case are acted upon by the merchants who made them as good contracts for the purpose of determining their rights; and it is only when such a contract is challenged in a court of justice in an action that the statute is called into operation to invalidate the contract. In such cases there may be said to be a good contract without writing, though there cannot be said to be a good actionable contract without writing. Bearing these considerations in mind we have to consider the 4th section of the Factors Act of 1877, which deals with transactions between merchants, and not with any question of an action on a contract. What is the object of that section? It is to give effect to transfers to bonâ fide purchasers without notice by persons in possession of certain documents of title with regard to goods as vendees of such goods, and to prevent the mischief which happens where persons dealing with the possessors of such documents find that after all the possession of the documents on which they relied may be invalidated as between the parties to the original contract of sale by reason of some fraud. The intention is to enable intending purchasers to deal freely and boldly with persons claiming to be

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vendees of goods who are in possession of the documents of title to the goods. The mischief aimed at would not be effectively cured, nor would the intention that purchasers should be able to deal freely and boldly with persons in possession of the documents of title be satisfactorily carried out, if such purchasers could be defeated by shewing that, though there was in fact an original contract of sale under which the persons with whom they dealt might well be lawfully in possession of the documents of title, such contract was not valid, because it was not in writing. In my opinion, the section, when it speaks of "goods sold or contracted to be sold," and the "vendee" of such goods, does not mean to imply as a condition of its applicability that there should be such a contract for sale in writing as would satisfy the Statute of Frauds, or that the vendee must be vendee under such a contract. It is dealing with the mercantile rights of the parties as resulting from the original contract apart from any question of proof or procedure in an action on the contract. It seems to me that Crossland was a vendee and the goods were contracted to be sold to him within the section, and that it is no answer to say that the contract was not in writing.

For these reasons, I think the judgment below was right and this appeal should be dismissed.

FRY, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Sharpe, Parkers & Co., for Weatherhead & Burr.*

Solicitors for defendants: *Elliott & Ash, for Robinson & Robinson.*

E. L.

[IN THE COURT OF APPEAL.]

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Jan. 18, 21.

ROSENBERG *v.* NORTHUMBERLAND BUILDING SOCIETY.

Building Society—Mortgage—Redemption—Advanced Member—Proviso for Redemption on Payment according to Rules "for time being" of Society—Alteration of Rules after Date of Mortgage—Certificate of Registrar—Building Societies Act, 1874 (37 & 38 *Vict. c.* 42), *ss.* 18, 20, 21.

An "advanced" or borrowing member of a building society executed a mortgage to the society to secure an advance made by them to him. The mortgage contained a covenant by the mortgagor to pay to the society all subscriptions, fines, and other moneys which, according to the rules for the time being of the society, should from time to time become due and payable by him in respect of the security or the shares by virtue of which the advance was made to him. The proviso for redemption was expressed in similar terms. The rules in force at the date of the mortgage did not render advanced members liable to contribute to the losses of the society. The rules were afterwards altered by the introduction of a provision that an advanced member should not be entitled to redeem his mortgage without paying, in addition to what would have been due from him under the original rules, his proportion of the losses of the society. The altered rules were certified by the registrar of building societies, as provided by the Building Societies Act, 1874:—

Held, that the new rules applied to the mortgage, and that the plaintiff desiring to redeem his mortgage must do so in accordance with those rules.

Smith's Case (1 Ch. D. 481) distinguished.

Held also, that the registrar's certificate was conclusive as to the validity of the proceedings taken by the society for the passing of the new rules.

Dewhurst v. *Clarkson* (3 E. & B. 194) followed.

APPEAL by the defendants against the judgment of Day, J., at the trial of the action without a jury.

The question was upon what terms the plaintiffs, M. L. Rosenberg and his wife, were entitled to redeem a mortgage which they had executed in favour of the defendant society.

The society was incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), and its rules were duly certified by the Registrar of Building Societies in September, 1875. The society consisted of preference shareholders and ordinary shareholders, and the rules provided that ordinary shareholders might receive an advance on their shares, upon their giving security for the same. An ordinary shareholder was bound to pay a monthly subscription of 10*s.* in respect of each share, according to tables

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annexed to the rules, and was liable also to pay certain fines if the monthly subscription was not punctually paid.

Rule 13, clause 4, was as follows :—

"If any member who shall have made a mortgage shall be desirous of paying and satisfying the same, and shall give notice of such his desire to the secretary, the directors shall receive the value of the unpaid subscriptions or sum due on the advanced share, according to the before-mentioned tables annexed hereto; and on payment of such value, together with all fines due in respect of such shares, the directors shall deliver all deeds and other documents in their custody relating to the security to the member; and at his or her cost indorse a receipt according to the Building Societies Act, 1874, s. 42."

Rule 31 provided that, "Any of these rules may be altered or rescinded, or any additional rule may be made, in manner provided by the 18th section of the Building Societies Act, 1874."

In October, 1876, the plaintiffs became members of the society in respect of 29¼ ordinary shares, and as such obtained from the society an advance of 2400*l.* 18*s.* 9*d.*, to secure which, "and all subscriptions and other payments to become due in respect of the shares," they executed a mortgage to the society, by which they appointed and granted to the society certain property over which they had a joint power of appointment, subject to a proviso for redemption.

The sum advanced was, according to the rules, to be repaid by monthly subscriptions, comprising principal and interest, spread over a term of twenty years.

The mortgage-deed contained a covenant by the mortgagors with the society, "that they would duly pay to the society all subscriptions, fines and other moneys, and do and perform all acts and things which, according to the rules for the time being of the society, and the provisions herein contained, should from time to time become due and payable, and which ought to be done and performed by the mortgagors in respect of this security, or the shares by virtue of which money was then advanced to the mortgagors as aforesaid."

The deed contained a proviso for the redemption of the mortgage as follows :—

"Provided always, that, if the mortgagors shall, from time to time during the continuance of the said security, duly pay to the society all the subscriptions, fines, and other moneys which, according to the rules for the time being of the society and the provisions of these presents, shall from time to time become payable in respect of the said shares now held by the mortgagors, by virtue of which money is now advanced to the mortgagors by the society, and shall duly observe and perform all the same rules, and the covenants herein contained, then the society shall and will at any time thereafter, upon the request and at the cost of the mortgagors, indorse upon these presents a proper receipt under the common seal of the society in the form set out in the Building Societies Act, 1874, for all moneys intended to be hereby secured, whereupon these presents shall be vacated."

In the year 1882 various alterations were made in the rules of the society, and the rules as altered were registered under the Act, the registration being duly certified by the registrar in the mode prescribed by the Act. In the altered rules the following rule 13, clause 4, was substituted for rule 13, clause 4, as it stood in the original rules:—

"If any member of this society, having received his or her share or shares, or any of them, in advance, shall be desirous of paying and satisfying the security or securities, and shall give one month's notice, if required by the directors, of such his or her desire to the society, the directors shall receive the balance, according to Rule IV., and on the payment thereof, together with all fines due in respect of such shares, and a proportionate part of bad debts, or estimated bad debts, losses and other charges that may be due or estimated to be due, the directors shall deliver all deeds and other documents in their custody relating to the security to the member, and at his or her cost indorse a receipt or acknowledgment on such mortgage according to the Building Societies Act, 1874."

In September, 1887, the plaintiffs desired to pay off the mortgage, and they tendered to the society the sum of 1367*l.* 9*s.* 6*d.*, the amount due from them under the original rules. The society claimed an additional sum of 328*l.* 6*s.* 7*d.* which they alleged to be the plaintiffs' proportion of estimated losses sustained by the

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society, and which they claimed to be due from the plaintiffs under the altered rules, and they refused to indorse a receipt on the mortgage unless this additional amount was paid by the plaintiffs.

The action was brought for the redemption of the mortgage on payment of the sum required by the original rules.

At the trial before Day, J., the plaintiffs contended that the alterations in the rules were invalid, on the ground that proper notices of the intended alterations had not been given to the members of the society before the resolutions adopting the alterations were passed.

The learned judge gave judgment for the plaintiffs, expressing his opinion that the alterations in the rules were not in fact validly made, but that, having regard to *Dewhurst* v. *Clarkson* (1), decided upon the Act 4 & 5 Wm. 4, c. 40, s. 4, he was bound to hold that the registrar's certificate was conclusive of the validity of the proceedings taken to effect the alteration. But he held, on the authority of *Smith's Case* (2), that the altered rules did not apply to the plaintiffs' mortgage, and that it was governed by the original rules.

The defendants appealed.

Cozens-Hardy, Q.C., and *W. S. Robson*, for the appellants. One question is whether the rules of the society as altered in 1882, assuming the alterations to be valid, apply to the plaintiffs' mortgage. Both the covenant for payment contained in the mortgage and the proviso for redemption contain the words "according to the rules for the time being of the society." The plaintiff has, therefore, contracted to pay such an amount as shall be due from him according to the rules which are in force at the time when the payment has to be made, and he is bound by the alteration in the rules, if the alteration was validly made. In a precisely similar case of *Wilson* v. *Miles Platting Building Society* (3) the Court of Appeal held that an advanced member of a building society was bound by an alteration made in the rules of the society after the date of his mortgage, and that on

(1) 3 E. & B. 194. (2) 1 Ch. D. 481.

(3) See post, p. 381.

coming to redeem he must pay the amount which was due from him according to the altered rules, though it exceeded the amount which would have been due from him under the rules which were in force at the date of his mortgage. *Smith's Case* (1) is either distinguishable, or it must be taken to have been overruled by the *Miles Platting Case* (2), which was not cited to Day, J.

The plaintiff cannot be heard to say that the alterations in the rules were not validly made. The registrar's certificate of registration is made by the Act conclusive as to the validity of the rules: Building Societies Act, 1874, s. 20. (3) This was decided in *Dewhurst* v. *Clarkson* (4), with regard to the certificate under the Act 3 & 4 Wm. 4, c. 40, s. 4, and there is no substantial difference between that section and s. 20 of the Act of 1874. The certificate may not be conclusive as to the legality of a rule, but it is conclusive as to the regularity of the proceedings by means of which it was passed: *Laing* v. *Reed.* (5)

Gainsford Bruce, Q.C., and *J. Lawson Walton*, for the plaintiffs. As to the validity of the new rules, Day, J., found as a fact that

(1) 1 Ch. D. 481.

(2) See post, p. 381.

(3) Sect. 18 provides that "Any society hereafter established may alter or rescind any rule, or make an additional rule, in the manner its rules direct, and every society under this Act altering or rescinding any rule, or making an additional rule, shall forward two copies of every resolution for rescission of a rule, and of every alteration of or addition to its rules, signed by three members and the secretary, and a statutory declaration of an officer of the society that the provisions of this section have been complied with, to the registrar, who, if he find that such alteration, addition, or rescission is in conformity with this Act, shall return one of the copies to the secretary or other officer of the society with a certificate of registration, and retain and register the other copy."

Sect. 20: "Any certificate of incorporation or of registration, or other document relating to a society under this Act, purporting to be signed by the registrar, shall, in the absence of any evidence to the contrary, be received by the Court, and by all Courts of Law and Equity and elsewhere without proof of the signature; and a printed copy of the rules of a society, certified by the secretary or other officer of the society to be a true copy of its registered rules, shall, in the absence of any evidence to the contrary, be received as evidence of the rules."

Sect. 21: "The rules of a society under this Act shall be binding on the several members and officers of the society, and on all persons claiming on account of a member, or under the rules, all of whom shall be deemed and taken to have full notice thereof."

(4) 3 E. & B. 194.

(5) Law Rep. 5 Ch. 4.

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proper notices were not given, and that the alterations were clearly invalid, unless the certificate was made by the Act conclusive as to their validity. But the words of the Act 4 & 5 Wm. 4, c. 40, are very different from those of s. 20 of the Act of 1874. And s. 21 of the latter Act speaks of the "rules of a society *under this Act*," which must mean rules made in compliance with the conditions of the Act. The certificate is only primâ facie evidence of the validity of the rules. At any rate, *Dewhurst* v. *Clarkson* (1) is not binding on this Court, and the reasoning of Erle, J., who differed from the view of the majority of the Court, is sound. *Laing* v. *Reed* (2) is really an authority in the plaintiffs' favour.

As to the application of the altered rules to the plaintiffs' mortgage, *Wilson* v. *Miles Platting Building Society* (3) is distinguishable. In that case a new rule was passed that the advanced members should contribute to losses. The covenant in the mortgage there was expressly to pay, among other things, "contributions." Here there is only a covenant to pay "subscriptions, fines, and other moneys." The words "other moneys" apply only to moneys ejusdem generis with subscriptions and fines. There is no word apt to cover contributions to losses.

Cozens-Hardy, Q.C., in reply. *Wilson* v. *Miles Platting Building Society* (3) was decided on the principle that a mortgagor in the case of a society of this kind is bound by the rules for the time being. Except under the rules, the plaintiffs could have no right to redeem at the present time. Under the proviso for redemption the right does not arise until the end of the period over which the subscriptions run. Any right to redeem before that time can only arise under the rules, and those rules are by the constitution of the society subject to modifications from time to time. The decision in *Wilson* v. *Miles Platting Building Society* (3) was that "rules for the time being" means the rules which are in force at the time when the question arises. This does not involve any alteration of the original contract of membership; it is really carrying it out, for it was part of that contract that the rules might be altered.

(1) 3 E. & B. 194. (2) Law Rep. 5 Ch. 4.

(3) See post, p. 381.

LORD ESHER, M.R. I think that we are bound by the judgment in *Wilson* v. *Miles Platting Building Society.* (1) It depended entirely on the stipulation contained in the mortgage deed as to the applicability of the rules for the time being. Cotton, L.J., said that it was clear from the words of that stipulation that the rights of the parties were to be regulated, not only by the rules in force at the date of the mortgage contract, but also by any rules which the society might from time to time make. We have in substance the very same stipulation in the present case, and, therefore, the rights both of the society and the members must be regulated by the rules of the society which are in force for the time being. I cannot distinguish the *Miles Platting Case* (1) from the present, and it is binding upon us; and, therefore, I need not stay to inquire whether, apart from that decision, I should have been of the same opinion for the reasons there given.

With regard to the question whether the new rules were duly passed, I have no doubt that the certificate of the registrar is conclusive that all the necessary preliminary steps had been duly taken to make those rules binding on the society and the members. The decision in *Dewhurst* v. *Clarkson* (2) appears to me to establish that proposition. I should have come to the same conclusion without any authority.

BOWEN, L.J. I am of the same opinion. As to the first point, I think it is only necessary to say that the case is, in my opinion, concluded by *Wilson* v. *Miles Platting Building Society.* (1) With regard to the second point, viz., whether the certificate of the registrar is conclusive that the new rules were duly passed, the inconveniences which would arise either way were fully considered in *Dewhurst* v. *Clarkson* (2), and it was there decided, many years ago, that the certificate was final. I cannot think that the legislature would have allowed the words of the present Act with regard to this matter to stand as they do, if they had intended to alter the law laid down in that case, and to enact that the certificate should not be final. I think that after this lapse of time we ought not to review that decision.

(1) See post, p. 381. (2) 3 E. & B. 194.

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FRY, L.J. I am entirely of the same opinion. As to the first point, viz. how far the alteration of the rules affects the plaintiffs' right to redeem the mortgage, I think the case is fully governed by *Wilson* v. *Miles Platting Building Society.* (1) I am unable to find any substantial distinction between the two cases. It is obvious that the position of a mortgagor in the case of a mortgage to a building society is by no means the same as that of an ordinary mortgagor, and that his rights must be more or less affected by the contract of membership, as well as by the contract of mortgage. It is equally apparent, I think, that the contract of membership carries in gremio the right on the part of the society to alter the rules from time to time. That right is given by statute. It is also apparent, both in the *Miles Platting Case* (1) and in the present case, that the covenant for payment and the proviso for redemption in the mortgage deed have reference to the rights of the members and of the society as regulated by the rules for the time being. That was the ground of the decision in the *Miles Platting Case.* (1)

Another argument addressed to us on behalf of the appellants was based on the suggestion that the plaintiff is seeking to exercise, not a right under the proviso for redemption, but a right expressly given by a particular rule to anticipate the period of redemption, and that that right was given to him as a member of the society, and was therefore subject to modification by the exercise of the power which the society possesses to alter its rules. I think that point is well worthy of consideration, and it probably was taken into consideration by the Court in *Wilson* v. *Miles Platting Building Society.* (1) In any case we are bound by that decision, and it appears to me to govern the present case.

With regard to the effect of the certificate of registration, I agree that it is conclusive as to the validity of the rules. It is difficult to find any intelligible reason for requiring such a certificate, unless it were intended to furnish proof that the rules had been duly passed. There are no words in the Act making the certificate primâ facie evidence only. The Act of 1874, which we have to construe, was passed many years after the decision in *Dewhurst* v. *Clarkson* (2), and after that decision had been acted on

(1) See post, p. 381. (2) 3 E. & B. 194.

in numerous cases, and I can see no indication of any intention on the part of the legislature to alter the law there laid down. I think, therefore, we are bound by that case.

Appeal allowed.

Solicitors for appellants: *F. Miller & Co., for Dickinson & Miller, Newcastle-on-Tyne.*

Solicitor for plaintiff: *G. B. Wheeler, for Fisher & Williamson, Newcastle-on-Tyne.*

W. L. C.

C. A. No. 2. April 28, 1887.

WILSON *v.* MILES PLATTING BUILDING SOCIETY.

This was an appeal by the plaintiff against a decision of Sir H. Fox Bristowe, V.C. of the County Palatine of Lancaster.

The plaintiff, an advanced member of the defendant society, claimed to redeem a mortgage which he had given to the society to secure the repayment of an advance made by them to him in respect of his shares. The society was registered under the Building Societies Act, 1874. By one of the rules the sum advanced was to be repaid with interest in the course of twenty-two years, by a series of monthly subscriptions consisting of principal and interest. By another rule a member who had received an advance secured by mortgage was entitled to redeem the mortgage before the expiration of the term for which the advance was made in manner provided by the rules. By the rules which were in force at the date of the plaintiff's mortgage advanced members were not bound to contribute to losses of the society. The plaintiff's mortgage contained a covenant by him to pay to the society "all subscriptions and contributions, interest, fines, premiums of insurance, and other moneys, and to do and perform all acts and things, which, according to the rules for the time being of the society, and the provisions herein contained, shall from time to time become due and payable, and which ought to be done and performed by the mortgagor." The proviso for redemption was expressed in similar terms.

Before the plaintiff gave notice to redeem his mortgage the rules of the society had been altered, and the altered rules provided that the board of directors should have power to charge to a member paying off any share or shares in respect of which an advance had been made such a sum or sums in respect of such share or shares as would, pro ratâ with the other subscriptions and paid-up shares in the society, in the opinion of the board be sufficient to cover any loss or anticipated loss of the society.

One of the questions raised was, whether the plaintiff's mortgage was subject to the altered rule. The Vice-Chancellor held that it was, and that the plaintiff could redeem only on the footing of that rule.

The plaintiff appealed.

Cookson, Q.C., and *Hopkinson*, for the appellant.

Cozens-Hardy, Q.C., and *Rotch*, for the society.

Romer, Q.C., and *Maberley*, for the directors.

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COTTON, L.J. The mortgage itself, strange to say, does not mention any time during which the payments are to be made, but, as a matter of fact, the rules of the society, which were incorporated in the security in consequence of the advance being made and the security given by a member of the society, provided that the security should continue for a period of twenty-two years, the payments being made according to certain tables.

The first question which we have to consider is, whether the new rules made by the society apply, or whether the right of the plaintiff and of the society are regulated entirely by the rules which were in force when the mortgage was given.

In considering that question we must look at the position of the plaintiff. He undoubtedly continued a member of the society, and he is still a member, till the security is redeemed and paid off altogether. One would expect, therefore, if the new rules were properly made, having regard to the laws regulating the society and to the original rules, that those new rules would regulate his position in regard to the security, it being, as was rightly contended for the appellant, not an ordinary mortgage to secure the payment in terms of a definite sum of money due and payable by the mortgagor to the society, but to secure the due payment by him of the periodical payments and fines, and any other moneys which he was bound to pay as a member of the society. One would, therefore, expect that, if new rules should be validly made by those who had the power of making rules, they would affect the rights both of the society and of the plaintiff under the mortgage. That being so, what we have really to consider is, whether there is anything to exclude the new rules from operating upon the plaintiff's security and the rights of the parties under it. So far from that being the case, this mortgage, as I understand it, expressly imports all rules which may from time to time be made by the society to regulate the rights of a member of the society. [The Lord Justice read the covenant for payment contained in the mortgage, and continued:—] That, to my mind, shews clearly that the rights of the mortgagor under the security, and the rights of the society as against him, are to be regulated by the rules for the time being in force, that is, by any rules which may at any time during the continuance of the security be passed by the proper authority, and become binding rules of the society.

An opinion or dictum of Lord Blackburn in *Gardner* v. *Lucas* (3 App. Cas. 582) was referred to, where he laid down the undoubted principle that as a general rule a statute applies to future and not to past transactions,—that it does not alter the rights of persons acquired under past transactions. But, if we look for a moment at the facts of that case, we shall see how entirely inapplicable it is to the present case. There the instrument which was in question was, at the time of its execution, ineffectual according to Scotch law, because it was not properly executed. A statute was afterwards passed which rendered unnecessary those formalities which, at the time when the instrument was executed, were necessary. Of course the general principle applied there. When an Act of Parliament was passed saying that it should be sufficient that certain formalities should be followed in the execution of a deed to make it effectual according to Scotch law, it is clear that that could not make valid an instrument which previously to the passing of the Act had been executed without those formalities; it could

only regulate what was to be thereafter necessary for the due execution of an instrument according to Scotch law.

Then the decision of Hall, V.C., in *Smith's Case* (1 Ch. D. 481) was referred to, and that is apparently more pertinent, and Hall, V.C., was undoubtedly a great authority on matters of construction. But in that case there was an entirely different covenant and a different rule. The covenant was, that the mortgagor would "pay into the society at the times and in manner prescribed by the rules for the time being applicable thereto respectively, the several sums of money payable periodically by way of subscription or otherwise" in respect of his shares. That covenant in terms contemplates only that the time and manner of payment may be from time to time varied; it does not refer to the payment of any sums whatever which should thereafter be prescribed by the rules for the time being of the society. And in the rules which were relied upon as altering the member's liability, there were some words which are not to be found in the rule in the present case, viz. that, "*so far as the rules of law and equity will permit*, these rules shall apply to all the members as well present as future, and to all its transactions as well past as future." As the covenant and the rule were framed in that case, I think that Vice-Chancellor Hall's decision was right. If he meant to say, that, in the case of a security containing a covenant by the mortgagor to pay everything which the rules of the society for the time being might require to be paid, new rules made after the date of the security would not apply, I should differ from his view and could not follow it. I do not, however, think that he intended to lay down any rule applicable to the present case. In my opinion, therefore, we must decide the rights of the parties in the present case with reference to the new rules. It is true that those rules may throw a heavier burden on the plaintiff, by requiring him to pay a larger sum for the redemption of the mortgage than the old rules did, but that is not an alteration of his contract. His contract, as I read it, was that he would pay, not merely what the then existing rules required, it is not confined to that, but whatever the rules of the society for the time being might require him to pay as a member. To say that the new rules do not apply would, in my opinion, be to alter the contract. Having regard to the terms of the covenant, it is not an alteration of the contract to say that the new rules do apply.

SIR JAMES HANNEN, and LINDLEY, L.J., concurred.

Solicitors for society: *Chester, Mayhew & Co.*

W. L. C.

1889
Jan. 25.

[IN THE COURT OF APPEAL.]

IN RE THE LOCAL GOVERNMENT ACT, 1888.
IN RE THE MUNICIPAL ELECTIONS (CORRUPT AND ILLEGAL PRACTICES) ACT, 1884.
EX PARTE WALKER.

County Council—Election—Illegal Practice—Inadvertence—Relief from Penalty—Discretion of Court—Appeal to Court of Appeal—Criminal Matter—Local Government Act, 1888 (51 & 52 *Vict. c.* 41), *s.* 75—*Municipal Elections (Corrupt and Illegal Practices) Act*, 1884 (47 & 48 *Vict. c.* 70), *ss.* 13, 17, 20—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.

The effect of s. 75 of the Local Government Act, 1888, is to incorporate into that Act ss. 13, 17, and 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884.

An appeal lies to the Court of Appeal against the refusal of a Divisional Court to make an order, under s. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, exempting a candidate at an election of county councillors from penalties incurred by him through inadvertence, under s. 17, by reason of practices which are declared to be illegal by s. 13, such a matter not being a criminal matter within the meaning of s. 47 of the Judicature Act, 1883.

On the occasion of the first election of county councillors under the Local Government Act, 1888, a candidate inadvertently incurred a penalty for an illegal practice, and a Divisional Court refused to grant him relief, on the ground that ignorance of the provisions of the Act was no excuse for a breach of them:—

Held, that, having regard to the difficulty of construing s. 75 of the Local Government Act, 1888, and to the fact that another Divisional Court had granted relief to other candidates under precisely similar circumstances, the exercise of the discretion by the Divisional Court might (with their assent on being informed of the decisions of the other Court), be overruled, and the relief granted.

APPEAL against the refusal of a Divisional Court (Lord Coleridge, C.J., and Hawkins, J.) to grant Gerald Walker relief from penalties under s. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884.

Walker was a candidate at the first election of county councillors, held under the provisions of the Local Government Act, 1888, for Richmond, Yorkshire, and he asked to be excused from penalties which he believed that he had inadvertently incurred, under s. 17 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (which by s. 75 of the Act of 1888 is incor-

porated with that Act), by reason of his having employed a paid agent in reference to the election.

The application was for an order that the employment by the applicant of Robert Sheriff, for payment or promise of payment, for the purpose of promoting or procuring the election of the applicant for the representation of Richmond in the county council, might be allowed to be an exception from the provisions of 47 & 48 Vict. c. 70, which would otherwise make the same an illegal practice, and that the applicant might not be subject to any of the consequences under the Act of his said acts, upon the ground that the same arose from inadvertence, and not from any want of good faith.

Notice of the application was served on the only other candidate for the division and on the returning officer, and advertisements were inserted in the principal local newspapers.

The applicant made an affidavit in which he stated that in November, 1888, he appointed Sheriff agent on his behalf to promote his election. The appointment was in writing, and no mention was made in it of remuneration, but he intended to give Sheriff some remuneration for his services. He added, "I had no idea that I was doing anything contrary to the law in so employing an agent, and I appointed him bonâ fide, and entirely by inadvertence as to the legal enactments applying to such a case. Sheriff has voluntarily abandoned any claim he might have had to remuneration, and, had I known that by employing him as aforesaid I was contravening any Act of Parliament, I should not have employed him." The applicant said that he first became aware that he might have been guilty of an illegal practice upon seeing a report in a newspaper of applications to the Court under s. 20 of the Act of 1884 in similar circumstances, and he at once consulted his solicitor, and was advised by him to make the present application.

Sheriff made an affidavit in which he said that he was not a lawyer, and was not aware, until he saw a report in the newspapers on January 12, of applications to the Court under s. 20 in similar circumstances, that it would be illegal on Walker's part to employ him for remuneration as his agent in the election. Immediately upon being informed that this was the case, he

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agreed to forego any claim he might have for remuneration, and he had so informed Walker. He became agent entirely by inadvertence, and not in any bad faith.

The Court of Appeal directed that notice of the appeal should be given to the Attorney-General, and that he should be requested to appear and argue the questions,—first, whether the application was a criminal matter in which there was no appeal from the Divisional Court to the Court of Appeal; secondly, whether the Act 47 & 48 Vict. c. 50, was incorporated by reference into the Local Government Act, 1888.

Sir R. E. Webster, A.G., and *R. S. Wright*, for the Crown. (1.) This is not a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873, and therefore an appeal lies to this Court. Assuming that ss. 13, 17, and 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, are, by s. 75 (1) of the Local Government Act, 1888,

(1) Sect. 75: "For the purpose of the provisions of this Act with respect to county councillors, and to the chairmen, members, committees, and officers of such councils, and otherwise for the purpose of carrying this Act into effect, the following portions of the Municipal Corporations Act, 1882, namely, Part Two, Part Three, Part Four (as amended by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884), s. 124 in Part Five, Part Twelve, Part Thirteen, the Second Schedule, Part Two and Part Three of the Third Schedule, and Part One of the Eighth Schedule shall, so far as the same are unrepealed and are consistent with the provisions of this Act, apply as if they were herein re-enacted, with the enactments amending the same, in such terms and with such modifications as are necessary to make them applicable to the said councils and their chairmen, members, committees, and officers, and to the other provisions of this Act."

By s. 13 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, (1) "No person shall, for the purpose of promoting or procuring the election of a candidate at a municipal election, be engaged or employed for payment or promise of payment for any purpose or in any capacity whatever" (with certain exceptions not material for the present purpose). (2) "Subject to such exception as may be allowed in pursuance of this Act, if any person is engaged or employed in contravention of this section, either before, during, or after an election, the person engaging or employing him shall be guilty of illegal employment, and the person so engaged or employed shall also be guilty of illegal employment, if he knew that he was engaged or employed in contravention of this Act."

By s. 17 (1): "A person guilty of an offence of illegal payment, employment, or hiring shall, on summary conviction, be liable to a fine not exceeding one hundred pounds."

Sect. 20: "Where, on application

incorporated into that Act, the fair construction of s. 20 is that it enacts that certain acts and defaults shall not under certain circumstances come within those sections of the Act which make them corrupt and illegal. It does not necessarily follow that a corrupt practice, to which a penalty is attached, will be an illegal act. But *Reg.* v. *Holl* (1) is a direct authority in favour of the right of appeal. That case arose upon s. 7 of the Act 26 & 27 Vict. c. 29, the words of which are not so strong as those of s. 20 of the Act of 1884.

(2.) That the provisions of the above-mentioned sections of the Act of 1884 are incorporated into the Local Government Act, 1888, is clear from the language of s. 75, and this view is confirmed by s. 2. The intention of the Act was that the elections of county councillors should be subject to the same provisions as those to which elections of borough councillors are subject.

Lumley Smith, Q.C., and *Archibald*, for the candidate.

LORD ESHER, M.R. We are all of opinion that, as regards the right of appeal, the case is entirely covered by the authority of *Reg* v. *Holl.* (1) We also think that the effect of s. 75 of the Local Government Act, 1888, is to introduce into that Act ss. 13,

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made, it is shewn to the High Court or to a Municipal Election Court by such evidence as seems to the Court sufficient

(*a*) that any act or omission of a candidate at a municipal election for a borough or ward of a borough, or of any agent or other person, would, by reason of being in contravention of any of the provisions of this Act, be but for this section an illegal practice, payment, employment, or hiring; and

(*b*) that such act or omission arose from inadvertence or from accidental miscalculation or from some other reasonable cause of a like nature, and in any case did not arise from any want of good faith; and

(*c*) that such notice of the application has been given in the said borough as to the Court seems fit;

and under the circumstances it seems to the Court to be just that the said candidate, agent and person, or any of them, should not be subject to any of the consequences under this Act of the said act or omission, the Court may make an order allowing such act or omission to be an exception from the provisions of this Act which would otherwise make the same an illegal practice, payment, employment, or hiring, and thereupon such candidate, agent, or person shall not be subject to any of the consequences under this Act of the said act or omission."

(1) 7 Q. B. D. 575.

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17, and 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884.

Lumley Smith, Q.C., and *Archibald*, for the candidate. The power given to the Court by s. 20 of the Act of 1884 is, no doubt, a discretionary power. But, in cases precisely similar to the present, another Divisional Court has given relief to other candidates, and for this reason the Court of Appeal is more free to exercise its own discretion independently. The agreement for the employment of the agent was clearly entered into inadvertently, in good faith, and in entire ignorance of the provisions of s. 13 of the Act of 1884, and the language of s. 75 of the Act of 1888 is so obscure that it would be very difficult for a layman to find out that the effect of it was to introduce s. 13 into the Act of 1888. This being the first election of county councillors under the Act of 1888, the Court will excuse an unintentional breach of its provisions more readily than on a future occasion when the effect of the section shall have become generally understood.

LORD ESHER, M.R. I have consulted the Lord Chief Justice and Hawkins, J., and they still adhere to the opinion which they expressed that it would not be right that a man should be excused from the penalties which he has incurred merely on the ground that he did not know the provisions of the Act. They think that people who are seeking to be chosen to an office created by the Act ought to take some pains to understand its provisions. And I am very strongly of opinion that, at any future election, it will be very difficult to excuse any one from penalties on this ground. But both the Lord Chief Justice and Hawkins, J., admit that other candidates have been excused by another Divisional Court on this very same ground, and they authorize me to state that they willingly agree in the observations which I am about to make. I think that, even if the present applicant had carefully read s. 75 of the Local Government Act, 1888, it is drawn in such a way that ordinary skill on the part of such a person could not readily have mastered the fact that ss. 13 and 17 of the Act of 1884 were made to apply to him. With all respect to the legislature, I think that when this Local

Government Act was introduced to regulate the conduct of a number of people all over the kingdom, it was a most unfortunate thing to introduce the penal provisions of other Acts by means of a section so obscurely worded as s. 75. The persons who were to be affected by those penal provisions might at any rate have had the advantage of seeing them set out in full in the Act of 1888 itself. The bringing in of those provisions by reference to a prior statute, and especially by such a reference as is contained in s. 75, was almost certain to lead candidates to commit offences against the provisions without knowing that they were committing any offence at all. I cannot think that the legislature intended that every candidate for a county council should have a skilled professional man constantly at his elbow to advise him as to the interpretation of the Act, and what he might or might not do under it. I cannot, under the circumstances, think that it was an inexcusable inadvertence on the part of this gentleman not to know that the provisions of the Municipal Corporations Act, 1882, and of the Act of 1884, which amended it, were introduced into the Local Government Act by s. 75. Having regard to what has been done in similar cases by another Divisional Court, and with the full assent of the Lord Chief Justice and Hawkins, J., to our altering their decision, I think we may very fairly excuse this gentleman from the penalties to which he would otherwise be subject, on the terms of his paying the costs of the application to the Divisional Court and of the appeal.

BOWEN, L.J. I am of the same opinion. I have no doubt that this is a case in which an appeal lies. But the Act certainly intended that the granting of such an application should be in the discretion of the Court below, and we ought not to interfere with the exercise of their discretion unless we are satisfied that there has been a miscarriage of justice. It turns out (though this was not known to the Lord Chief Justice and Hawkins, J., when they gave their decision) that another Divisional Court had excused other candidates from the consequences of an inadvertence of precisely the same kind, and upon the very ground that s. 75 of the Act is so drawn as to lead to considerable confusion. This is certainly a reason why a man should not be punished for doing

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that from the consequences of which another man in a precisely similar case has been excused. It must be the desire of all the Courts that there should be uniformity of decisions, and, this circumstance having been mentioned to the Lord Chief Justice and Hawkins, J., they have informed us that, we are at liberty to state that they fully assent to that which we are now doing. The course adopted in similar cases by the other Divisional Court is a very strong reason for our interfering (so far as it can be said that we do interfere) with the exercise of the discretion of the Divisional Court in the present case.

FRY, L.J. I am of the same opinion. Having regard to the novelty of the application, and to the difficulty in construing the Act, I am glad that we are able, with the assent of the Lord Chief Justice and Hawkins, J., to make the order asked for. But I cannot help observing upon the recklessness with which people seek to be appointed to offices without previously taking any trouble to inform themselves of the nature of the duties and liabilities which are attached to those offices. On the occasion of any future election it may be that quite another measure of justice will be meted out to persons who commit similar breaches of the provisions of the Act.

LORD ESHER, M.R. It certainly will be so.

Solicitors: *Oldman & Clabburn; Solicitor to the Treasury.*

W. L. C.

[IN THE COURT OF APPEAL.]

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Feb. 13.

BROWN AND WIFE *v.* THE EASTERN AND MIDLANDS RAILWAY COMPANY.

Nuisance—Heap of Earth near Highway—Horse frightened—Evidence that other Horses had been frightened by the same Object—Admissibility.

In an action for a nuisance it appeared that the plaintiff was driving at night in a cart drawn by a horse along a public highway, when the horse shied at a heap of earth and refuse placed by the defendants on their land adjoining the highway, and the cart was upset and the plaintiff injured.

Evidence was tendered by the plaintiff to prove that other horses had shied at the heap on the same day :—

Held, that if the heap was of such a nature as to be dangerous by causing horses passing on the highway to shy, it was a public nuisance, and that the evidence shewed that the heap was likely to cause horses to shy, and was therefore admissible.

ACTION for negligence.

The pleadings, facts, and arguments sufficiently appear in the judgment of the Court.

1889. Jan. 25. *Philbrick*, *Q.C.*, and *Poyser*, for the plaintiffs, cited *Harris* v. *Mobbs* (1); *Wilkins* v. *Day*. (2)

Kemp, *Q.C.*, and *Haigh*, for the defendants.

Cur. adv. vult.

1889. Jan. 30. The judgment of the Court (Denman and Stephen, JJ.) was read by

STEPHEN, J. This was a motion to set aside judgment of nonsuit, and to enter judgment for the plaintiffs for 150*l.* in an action tried at Norwich in July, 1888, before Pollock, B. The statement of claim stated that the defendants negligently placed a heap of earth scrapings and refuse in a public highway so as to obstruct it, whereby Mrs. Brown, one of the plaintiffs, who was driving along the highway, was thrown from her cart and injured, the damages being agreed at 150*l.*, her horse having shied at the heap.

The statement of defence denied that the defendants placed the heap on the road, or suffered it to remain there, and that, in any event, they placed it so as to be an obstruction, and did not admit that the horse shied at it.

The reply stated that if the heap was not on the road, it was

(1) 3 Ex. D. 268. (2) 12 Q. B. D. 110.

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placed upon land of the defendants immediately adjoining the road, and allowed to remain so as to be a public nuisance to persons using the road, and upon this issue was joined.

It appeared on the trial that the place where the accident happened was a triangular piece of ground, acquired by the railway under parliamentary powers for the purpose of diverting a road, and surrounded by three roads, namely, the two branches of the old road and a short branch which connected them. The heap of refuse consisted of a cartload of road-scrapings, collected by the servants of the company from these roads and deposited by them on the triangular piece of land inclosed by the roads, and two or three yards from the road. (1) There was evidence that the public drove over the three-cornered piece of ground.

At the end of the plaintiffs' case the judge nonsuited the plaintiffs, and in the course of the trial he excluded evidence to shew that after the placing of the heap on the ground (which was on the morning of the day when the accident happened at about 6.30 P.M.) several horses passing the place shied at the heap.

It was contended before us that the nonsuit was right, that the land being the defendants they had a right to place the heap on it, and that if it frightened horses passing by they were not responsible; also that the fact that other horses shied at the heap was not admissible as evidence that the plaintiffs' horse shied at it.

Two questions then occur. 1. Assuming that the horse shied because the heap was placed on the defendants' land, was the plaintiff entitled to recover? 2. Was the fact that other horses shied at the same place on the same day admissible evidence that the plaintiffs' horse shied at the heap?

These two questions appear to us to admit of the following short answers.

If a person erects on his own land anything whatever calculated to interfere with the convenient use of the road, he commits a nuisance. Every railway which, without express parliamentary sanction, ran by the side of a highway so as to frighten horses, &c., would be a nuisance but for the parliamentary authority under

(1) The horse shied at the heap and went across the road, and the cart was upset at the side of the road, whereby the plaintiff was injured.

which it was made. So if a man kept a ferocious and noisy dog so near a highway as to be likely to frighten horses on it by his barking. If, therefore, this heap was of such a nature as to be likely to cause common horses to shy it was a public nuisance. Whatever, therefore, shewed it to be likely to cause horses to shy was evidence for the plaintiffs.

It was proposed to shew by the plaintiffs that as soon as it was erected, and till within a short time before their own horse shied, various horses passing by shied at the same place. Several instances were given by Mr. Philbrick from the reports in which such evidence had been admitted, and we think it was rightly admitted. It is perfectly true that evidence of events similar to the one under inquiry on account of their general similarity, is not admissible. You must not prove, e.g., that a particular engine driver is a careless man in order to prove that a particular accident was caused by his negligence on a particular occasion; nor that a person accused of crime is an habitual criminal; but when the question is whether a particular act is a public nuisance, it is difficult to see how it can be proved to be so except by shewing cases in which it has interfered with a public right. If a trade is alleged to be noxious by producing unwholesome smells it may surely be proved that such a smell is frequently perceived, and that it has an injurious effect on those who perceive it.

We think that the judgment of nonsuit should be set aside, and that the case should go for a new trial.

Rule absolute.

J. R.

The defendants appealed.

Feb. 13. *Haigh*, (*Kemp, Q.C.*, with him), for the defendants.

Poyser, (*Philbrick, Q.C.*, with him), for the plaintiffs, was not called upon.

THE COURT (Lord Esher, M.R., Bowen and Fry, L.JJ.), were clearly of opinion that the evidence was admissible, and affirmed the decision of the Queen's Bench Division.

Appeal dismissed.

Solicitors for plaintiffs: *Grundy, Izod & Grundy.*

Solicitors for defendants: *F. C. Mathews & Lroune.*

W. J. B.

1888
May 16, 17;
June 14;
1889
Jan. 16, 17, 30.

THE MAYOR, ALDERMEN, AND CITIZENS OF DURHAM *v.* FOWLER AND ANOTHER.

Principal and Surety—Liability—Discharge—Rate Collector—Bond for Performance of Duties—Breach of Condition—Irregular Mode of accounting—Acquiescence—Connivance—District Rate—Borough Rate—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 195—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 144.

Mere laches of the obligee, or a mere passive acquiescence by the obligee in acts which are contrary to the conditions of a bond, is not sufficient of itself to relieve the sureties.

The plaintiffs sued the defendants, as sureties, on two bonds, the first given to the plaintiffs, as urban sanitary authority, to secure the due performance of the duties of a collector of district rates under the Public Health Act, and the second given to the plaintiffs, as the corporation of a borough, to secure the performance by the same person of his duties as collector and receiver of borough rates under the Municipal Corporations Act.

The evidence shewed that the plaintiffs had acquiesced in an irregular mode of accounting on the part of the collector, but that the collector was never suspected of dishonesty until a year after the date of the second bond, when defalcations were discovered, and he was dismissed.

The jury in answer to questions put to them found first, that, the plaintiffs had permitted the collector to retain moneys in his hands for a longer period than a week (which was contrary to s. 195 of the Public Health Act, 1875, and to the conditions of the bonds, and to a resolution passed by the plaintiffs before the bonds were given); and, secondly, that the plaintiffs had permitted him to mix the proceeds of the different rates:—

Held (by Charles, J., on further consideration, and by Denman and Stephen, JJ., dismissing a motion to enter judgment for the defendants, or for a new trial), that the plaintiffs' acquiescence in the collector's irregular mode of accounting was not such connivance as to discharge the sureties; that upon the evidence there were no questions which the Judge could have been properly required to leave to the jury other than those he did leave; and that on the facts proved at the trial, and on the findings, there was no defence to the action, and the plaintiffs were entitled to judgment.

The resolution directing the borough rate to be levied had fixed the amount in the pound:—

Held, that, although, on the true construction of s. 144 of the Municipal Corporations Act, 1882, the resolution ought only to have ordered a rate for a particular total amount, and assessed the contributions from each parish, leaving it to the overseers to fix the amount in the pound, nevertheless the addition of the amount did not vitiate the order, and the rate was valid.

Held (by Denman and Stephen, JJ.), that on the construction of the second bond, in which the person guaranteed was described as "collector and

receiver," the sureties were liable for his breach of the condition to pay over moneys received by him, independently of the question of the validity of the rate.

ACTIONS on two bonds against the defendants as sureties for the due performance of the duties of a rate collector.

The two actions were tried together before Charles, J., and a special jury at the Durham assizes in March, 1888.

The jury found, in answer to questions left to them, that the plaintiffs had permitted the collector to retain moneys in his hands for a longer period than one week, and also had permitted him to mix the proceeds of the various rates.

On these findings the case was reserved for further consideration, and was argued on May 16 and 17.

The facts are fully stated in the following judgment.

1888. June 14. CHARLES, J. In these two actions, which were tried together at the Durham winter assizes, the mayor, aldermen, and citizens of Durham sought to recover two sums of 479*l.* and 500*l.* under the bonds for 500*l.* each, dated respectively February 4, 1882, and November 28, 1885. The bond dated February 4, 1882, was given by the defendants George Fowler and Thomas Crichton to secure the due performance by one William Goundry of his duties as collector of rates under the Public Health Act. The bond dated November 28, 1885, was given by the same persons to secure the due performance by William Goundry of his duties as collector and receiver of borough rates. Thomas Crichton died after the writs had been issued, and the actions were continued against Marion Crichton, his widow and executrix.

The facts of the case are as follows.

William Goundry was originally appointed collector of the rates under the Public Health Act in January, 1863, and his duties with reference to the collection of moneys were at that time thus described by statute 11 & 12 Vict. c. 63, s. 39: "Every such officer or servant employed in the collection of rates under the authority of this Act shall within seven days after he shall have received any moneys on account of such rates pay over the same to the treasurer, and shall, as and when the said local board

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may direct, deliver a list signed by him containing the names of all persons who have neglected or refused to pay any such rate, and the sums respectively due from them; and every officer and servant appointed or employed by or acting under the said local board shall respectively, when and in such manner as shall be required by such board, make out and deliver to them a true and perfect account in writing of all moneys received by him for the purposes of this Act, and stating how and to whom and for what purpose such moneys have been disposed of, and shall together with such account deliver the vouchers or receipts for all payments made by him, and pay over to the treasurer all moneys owing by him upon the balance of accounts." This enactment is repeated in the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 195. The corporation, as urban sanitary authority, have replaced the local board. By s. 222 of the last-named Act rates collected under the Act may be collected either separately or with any other rate or tax, as the urban sanitary authority may from time to time appoint.

The seven days' limit had not for some years before the bond was given been observed, and in the opinion of the borough accountant, who was appointed in 1879, the method adopted by Goundry of keeping the borough accounts was not satisfactory, and he made various suggestions by way of improvement, which were reported upon by the finance committee of the town council on September 14, 1880. The following is their report: "We have given an anxious and careful consideration to the suggestions of the accountant relative to the collection of rates and mode of keeping the books of account relating thereto. We are informed by Mr. Goundry and Mr. Statten that in the event of the suggested change being carried out an increased outlay of about 150*l.* a year will be thereby involved. We are not prepared to recommend so considerable an outlay for the trifling advantage to be gained by the proposed alteration, and believing that the system at present in force, and which has worked satisfactorily during the past twenty years, though simple, is economical, and amply sufficient for our requirements, we do not recommend that any of Mr. Statten's suggestions should be adopted by the council."

On the same day the following resolution was passed: "That all sums of money collected and received by the collector for and on account of this council be paid to the treasurer of the council once a week." Notwithstanding this resolution Goundry did not alter his practice, and with the acquiescence of the plaintiffs had rendered his account at irregular intervals. There was not, however, when the bond of February 4, 1882, was given, any cause whatever to suspect his integrity.

That bond, after reciting Goundry's original appointment, and his request to Fowler and Crichton to become his sureties, is in these words: "The condition of the above written bond or obligation is that, if the collector shall from time to time and at all times during his continuance in the said office of collector collect the rates and other moneys which he ought to collect by virtue of his office as now existing, or as the same may be lawfully modified from time to time, and shall within seven days after he shall have received any moneys on account of such rates or other moneys, pay over all such moneys to the treasurer of the local authority or other person from time to time lawfully authorised to receive the same, and shall duly and correctly account to, and produce and deliver the vouchers or receipts for all payments made by him in the execution of his said office to the proper auditor or auditors, or to any other person or persons from time to time lawfully entitled to require him to account for all or any of such his collections and payments, and shall in all respects duly discharge and faithfully execute the duties of his said office, and obey the lawful directions of the local authority applicable thereto, ... then such bond shall be void, but otherwise shall be and remain of full force and effect."

Goundry continued to collect and account after the bond was given in the same manner as before. On November 9, 1885, by a resolution of the town council he was appointed collector and receiver for collecting and receiving the watch and borough rates respectively already made and thereafter to be made and ordered by the council upon all and every the messuages, lands, tenements, and hereditaments situate or being in or within those parts of the several parishes, townships, or places of St. Giles, &c., which lie within the city of Durham, and in or within the

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several parishes or townships of St. Mary, &c., within the city of Durham. And it was further resolved "that the said William Goundry enter into a bond for 500*l.* with two sufficient sureties for the faithful performance of the duties of the said office."

In pursuance of this resolution the bond dated November 28, 1885, was given. It recites in terms the resolution of November 9, appointing Goundry collector and receiver, and that it was his duty, by virtue of his appointment, to receive and collect from the overseers of the various parishes the sums of money levied and raised upon the parishes in respect of the watch and borough rates, and to pay the same to the treasurer of the city, and proceeds as follows: "The condition of the above-written bond is such that, if the above bounden William Goundry shall from time to time, and at all times hereafter during such time as he shall continue in his said offices as collector and receiver, whether by virtue of his aforesaid appointment or any re-appointment or re-appointments thereto, or of any retainer or employment by or with the consent of the said mayor, aldermen, and citizens, or their successors, or the said council for the time being, duly, attentively, and faithfully execute and perform the said offices of collector and receiver, and use his best endeavours to make, levy, raise, and receive the said watch rates and borough rates, which have now, or shall or may at any time or times hereafter during the present or any subsequent year be made, and which it shall be his duty as such collector and receiver, or by virtue of such appointment or re-appointment, retainer or employment as aforesaid, to receive; and if the said William Goundry shall pay to the treasurer for the time being of the said city all sums of money which he shall receive on account of such rates at the times appointed from time to time by the order or precepts of the said mayor, aldermen and citizens, or of the said council for the time being, either to the said William Goundry or the overseers of the said parishes or townships; and also if the said William Goundry shall from time to time, and at all times hereafter during such time as he shall continue in his said offices of collector and receiver of the said watch and borough rates aforesaid, whether by virtue of his aforesaid appointment or of any re-appointment or re-appointments thereto, or of any

retainer or employment by or with the consent of the said mayor, aldermen, and citizens, or their successors, or the said council for the time being, duly, attentively, and faithfully execute and perform the duties of the said offices of collector and receiver, and shall pay to the said treasurer for the time being all sums of money which he shall receive from time to time by virtue or on account of such last-mentioned offices as soon as the same shall be received; and if the said William Goundry shall at all times keep a regular, proper, and accurate account of all sums of money which he shall receive by virtue of either of his said offices, either under the said appointment or any re-appointment or re-appointments as aforesaid; and if the said William Goundry shall, when requested by the said council or treasurer for the time being, produce such accounts as aforesaid; and if the said William Goundry shall, when requested by the said mayor, aldermen, and citizens, or the said council, or the town clerk of the said city, or the treasurer for the time being, pay to such treasurer any moneys that may be then in his hands or may have been received by him, and not paid to the said treasurer in respect of the said rates, although the times mentioned in the said orders or precepts shall not have arrived . . . . And if the said William Goundry, so long as he shall be such receiver and collector as aforesaid, either by virtue of his present appointment or any re-appointment or re-appointments as aforesaid, shall in all things behave and conduct himself as a good, faithful, honest, just and diligent receiver and collector as aforesaid, and in all things well, truly, honestly, diligently, and faithfully do and perform his duty in the said offices, then the above-written obligation to be void, but otherwise to be and remain in full force and virtue."

Goundry from the date of his appointment collected and received moneys on account of all three rates, namely, the district rate under the Public Health Act, 1875, which re-enacted the section already referred to, and the watch and borough rates. The district rate in Durham is levied in January, May and September, the borough rate in February, in each year. No question arises as to the watch rate in these proceedings. In some instances he collected the rates together, but whether he collected them together or not the bank book shewed that his

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habit was to put each rate in funds towards of the close of the currency of such rate. Thus in February, 1886, he paid in large sums to the credit of the borough rate, and nothing to the district rate, and he pursued the same course with regard to the district rate in May and September, paying in little or nothing to the credit of the borough rate. His payments in respect of either rate were in sums varying largely one from another. In December, 1886, there were occurrences which induced the finance committee to order Goundry's books to be examined, and the result was the discovery of a deficiency in the district rate made in September, 1886, of 479*l.*, and in the borough rate made in February, 1886, of 1203*l.* His accounts of the borough rate made in February, 1885, and of the previous district rates shewed no deficiency. Goundry on the discovery of these deficiencies was dismissed, prosecuted for embezzlement, and convicted at the Durham winter assizes, 1887.

The borough rate in February, 1886, purported to be levied by a resolution dated February 3 in the following terms: "That a rate or assessment of 6*d.* in the pound be made on all and every the occupiers of messuages, lands, and other hereditaments situate, lying and being in or within the city of Durham and Framwellgate, as and for a borough rate pursuant to the statute in such case made and provided, and that the request warrants, or precepts, under the common corporate seal for duly authorizing the making, levying, and collecting such rate or assessment be sealed and issued as directed in and by the same statute." In accordance with this resolution the following precept was issued to the overseers of the various parishes: "City of Durham.—At a meeting of the council of the city of Durham holden at the Town Hall in and for the said city on the 3rd day of February, A.D. 1886. Whereas by virtue of the Municipal Corporations Act, and Acts of Parliament made and now in force for the making, levying, and collecting of borough rates, the council of the said city of Durham have ordered and directed that a fair and equal borough rate shall be made for all the purposes for which borough rates are now by law leviable under or by virtue of the said Act passed in the tenth year of the reign of Her present Majesty, and the said council have accordingly assessed

and taxed all and every the parishes, the townships, parts of parishes and townships and other places parochial and extra-parochial within the said city rateably and equally according to a pound rate of 6*d.* in the pound of the full and fair annual value of the messuages, lands, tenements, and hereditaments, and other rateable property within the said city, and in and by such rate or assessment the said council have assessed and taxed upon, [for example,] the parish of St. Nicholas within the said city, whereof you are the overseers, the sum of 428*l.* 15*s.* 5*d.*, that being the sum applicable to the parish of St. Nicholas. And the said council have further ordered and directed that the said sum of money so charged and assessed upon the said parish of St. Nicholas within the said city shall be levied, raised, and collected by you, as such overseers as aforesaid, within the same parish, as money for the relief of the poor is lawful to be levied, assessed, collected, and recovered. Now you are hereby ordered and required to levy, raise, and collect the said sum of money so charged and assessed upon the said parish of St. Nicholas within the said city, and of which parish you are the overseers as aforesaid, and to pay the said sum of 428*l.* 15*s.* 5*d.* into the hands of Mr. William Goundry, to be by him paid and delivered over to Mr.—— the treasurer of the said city on or before the —— day of —— now next ensuing, to be by such treasurer paid and accounted for according to law."

This precept was addressed to the overseers of the poor of the various parishes or parts of parishes within the city of Durham.

Sect. 144 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), enacts that:—

"1. If the borough fund is insufficient for the purposes to which it is applicable under this Act or otherwise by law, the council shall from time to time estimate, as correctly as may be, what amount, in addition to the borough fund, will be sufficient for those purposes.

"2. In order to raise that amount the council shall, subject to the provisions of this Act, from time to time order a rate, called a borough rate, to be made in the borough.

"3. A borough rate may be made retrospectively, in order to raise money for the payment of charges and expenses incurred,

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or which have come in course of payment, at any time within six months before the making of the rate.

"4. The council shall assess the contributions to the borough rate on the several parishes and parts of parishes in the borough in proportion to the total annual value of the hereditaments in each parish or part which are rateable to the poor, or in respect of which a contribution is made to the poor rate.

"5. That value shall be estimated according to the valuation list (if any) in force for the time being, and if there is none, according to the last poor rate.

"6. But if for any reason the council think that the valuation list or poor rate is not a fair criterion of value they may cause an independent valuation to be made."

Sub-s. 7 gives power to inspect books for the purpose of assessing the borough rate or for the purpose of an independent valuation. Sub-s. 8 gives power to enter on and view lands in order to ascertain their annual value, and by further sub-sections an appeal is given to the recorder in case any parish is aggrieved by a borough rate on account of the proportions assessed as contributions being unequal, or on account of any other just cause of complaint.

Sect. 145 enacts that:—"1. Where a parish is wholly in a borough, the council may from time to time, if they think fit, order the overseers to pay the contribution of the parish to the borough rate out of the poor rate made or to be made for the parish.

"(2.) The overseers shall pay the contribution to the council or as they order.

"(3.) If the overseers fail to pay as ordered, the amount may be levied off the goods of them, or any of them, by distress, by virtue of a warrant signed by the mayor and sealed with the corporate seal, or signed by two justices in and for the borough."

At the trial the jury found that the corporation had permitted the collector to retain moneys in his hands for a longer period than one week, and also had permitted him to mix the proceeds of the various rates. On these findings and the admitted facts I reserved the case for further consideration, and I heard the arguments on May 16 and 17.

The contentions on the part of the defendants may, I think, be summarised thus. First it was said that, having regard to the facts, the terms of the bond of February 4, 1882, were misleading, and that the recital that Goundry was collector of rates under the Public Health Act was untrue. He was more like, it was said, a banker than a collector. Further it was argued that the language of the bond involved a representation that the collector should pay over his moneys weekly, and that such representation was the basis of the contract.

Secondly, apart from the language of the bond, the defendants contended that the fact of Goundry having been permitted to account at longer intervals than a week ought to have been disclosed to the sureties.

Thirdly, that the acquiescence in Goundry's not accounting weekly during the currency of the bond increased the risk, and so discharged the sureties.

Lastly, that the jury in effect found that there had been connivance in such a sense as discharged the sureties.

These contentions applied to both rates, and in addition to them the defendants insisted, as regards the borough rate, that it was invalid altogether, and that therefore nothing could be claimed from the sureties under the bond.

I will deal with these contentions in the order in which I have named them.

First, with regard to the district rate, I am of opinion that the terms of the bond were not misleading. Goundry had been duly appointed collector, and there is nothing in the language either of the recital or of the condition to lead the sureties to suppose that any particular mode of accounting or not accounting had been adopted in the past. The language is consistent with the fact of the plaintiffs never having, in fact, called on him to account at all. With regard to the borough rate there is also in my opinion no foundation for the suggestion that there was anything in its terms to mislead the sureties.

But was there, apart from the language of the bond, any obligation on the part of the corporation to disclose the system, or rather want of system, according to which Goundry's accounts were rendered? I can see none.

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The principles which govern the question are laid down in *Railton* v. *Mathews*. (1) It was there decided that mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with, and within the knowledge of the persons obtaining a surety bond, was undue concealment, though not wilful or intentional. Undue concealment is there described by Lord Campbell as the omission to divulge facts within the knowledge of the persons to whom the bond is given, which they were bound in law to divulge. (2)

If there were facts which they were bound in law to divulge, and which they did not divulge, the surety is not bound by the bond. If they had facts within their knowledge, which it was material the surety should be acquainted with, and which they did not disclose, in my opinion the undue concealment of those facts discharges the surety, and whether they concealed those facts from one motive or another is, I apprehend, wholly immaterial. But here the only fact which it is suggested ought to have been communicated was that the resolution of September 14, 1880, had not been acted upon—a resolution of the very existence of which the sureties were ignorant—and, as regards the district rate, that Goundry had not in fact been rigidly performing his statutory duty. I cannot come to the conclusion that the plaintiffs were bound in law to divulge either fact. The nature of the office was in each case accurately described, and the previous method of accounting was not in my opinion a fact material for the sureties to be acquainted with.

The next question which arises is whether acquiescence by the plaintiffs in Goundry's not accounting weekly during the currency of the bond discharged the sureties, or, as it was put by the defendants' counsel, whether there was such connivance at Goundry's irregularities as discharged them. Now there was nothing more than acquiescence. There was not, after the dates of the bonds, any formal relaxation of his statutory duty, and it seems to me that it was the obligors' business, if anybody's, and not the plaintiffs', to see that the statutory duty was carried out. The jury did not, in my opinion, find that there had been connivance in any such sense as discharged the sureties. There was

(1) 10 Cl. & F. 934. (2) 10 Cl. & F. at pp. 942, 943.

certainly no evidence of connivance with the dishonest acts of Goundry.

Now the sort of connivance which will discharge a surety is clearly indicated in *Dawson* v. *Lawes*. (1) There must be, according to Wood, V.-C., in that case "active connivance, amounting almost, if not entirely, to a fraud." (2) In the present case there was nothing of the sort. There was, it is true, passive acquiescence in a somewhat slovenly method of accounting, and of mixing the moneys received. But, to use the language of Lord Brougham in *Mactaggart* v. *Watson* (3): "Assuredly it is no argument against my being answerable for a man's not doing a certain thing that the party to whom I gave this obligation did not see that he did the thing. I had myself undertaken for his doing it, and it is no discharge of my voluntary obligation that the other party, the obligee, did not see to his proceedings."

There remains the last question, which only affects the bond given for the borough rate. It is said that the rate is altogether invalid, because the urban sanitary authority had no power to make a rate of 6*d.* in the pound. Their only power, it was argued, was to order a rate for a particular total amount, and to assess the contributions from each parish, leaving to the overseers the task of fixing the amount per pound to be paid. I think that this is the proper construction to place on s. 144 of the Municipal Corporations Act, 1882. But although that is my opinion, it by no means follows that the rate in this case is invalid. I think that the resolution of February 3 may be regarded simply as an order for a rate, an order not vitiated by the addition of the amount per pound proposed to be levied. That order was followed by a precept to the overseers of each parish or part of a parish, apportioning amongst the various parishes the amount to be raised, and directing the overseers to levy the sums charged and assessed. In my opinion, though the resolution went too far in assuming to assess the occupiers of messuages, &c., it was a good order for a rate, and the precept apportions the total sum wanted among the various parishes, and requires the overseers to raise it.

Upon the whole, therefore, it seems to me that the borough

(1) Kay, 280; 23 L. J. (Ch.) 434.

(2) Kay at p. 301; 23 L. J. (Ch.) at p. 438. (3) 3 Cl. & F. at p. 540.

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rate was well made. It is unnecessary to decide what would have been the liability of the surety if the rate had been invalid. I may say, however, that I thought there was much force in the argument addressed to me on the language of the bond, which seems to cover the case of moneys received in fact, even though received under an invalid rate.

For the reasons given, therefore, my judgment, subject to the accountant's report, will be for the plaintiffs, with costs.

Judgment for the plaintiffs.

1889. Jan. 16, 17. The case was argued before the Divisional Court on a motion to set aside the judgment and enter judgment for the defendants upon the findings of the jury, or in the alternative for a new trial, or such further or other relief as might seem just, on the following grounds :—

(1.) That the learned judge at the trial improperly received the following evidence :—

(*a.*) Parol evidence as to the duties of William Goundry as collector of the borough and district rates.

(*b.*) The district rate excuse book.

(*c.*) The borough rate precepts.

(*d.*) The borough rate book.

(2). That the learned judge improperly withheld the following questions from the jury :—

(*a.*) Were the corporation guilty of negligence in the way in which they dealt with their collector?

(*b.*) Did the negligence of the corporation enable the collector to commit the defalcations complained of?

(*c.*) Was there connivance at the collector's irregularities which enabled the collector to commit the frauds?

(*d.*) Did the corporation knowingly permit the collector to keep insufficient books?

(*e.*) Did the corporation knowingly permit the collector to act in another capacity than that of collector or receiver?

(*f*) Were the statements in the bonds with reference to the collector's duties, and was the conduct of the corporation towards the collector, calculated to mislead the sureties as to the position and duties of the collector?

(*g.*) Did the mode in which the corporation allowed the collector to deal with the rates throw upon the sureties a greater risk than that which was contemplated by the parties to the bonds?

(*h.*) Ought the corporation, at any time during the continuance of the bonds, to have dismissed the collector, or to have informed the defendants of the facts within their knowledge?

(3.) That there was no evidence to prove that the borough rate was ever duly, or in fact, made or levied, or that Goundry was ever duly appointed collector or receiver thereof, either for or from the overseers, or at all, or that he ever received any moneys as such collector or receiver.

J. Lawson Walton, for the defendant Fowler, in support of the motion.

E. Tindal Atkinson, Q.C., and *T. C. Granger*, for the plaintiffs.

The arguments are fully stated in the judgment of the Court.

The following authorities were referred to:—*Trent Navigation Co.* v. *Harley* (1); *Nares* v. *Rowles* (2); *Wilks* v. *Heeley* (3); *Mactaggart* v. *Watson* (4); *Stone* v. *Compton* (5); *Creighton* v. *Rankin* (6); *Webb* v. *James* (7); *Railton* v. *Mathews* (8); *Kepp* v. *Wiggett* (9); *Dawson* v. *Lawes* (10); *Stewart* v. *M'Kean* (11); *Madden* v. *M'Mullen* (12); *Watts* v. *Shuttleworth* (13); *Black* v. *The Ottoman Bank* (14); *Phillips* v. *Foxall* (15); *Sanderson* v. *Aston* (16); *Polak* v. *Everett* (17); *Guardians of Mansfield Union* v. *Wright*. (18)

Cur. adv. vult.

(1) 10 East, 34.
(2) 14 East, 510.
(3) 1 C. & M. 249.
(4) 3 Cl. & F. 525: 10 Bligh (N.S.) 618.
(5) 5 Bing. N. C. 142.
(6) 7 Cl. & F. 325.
(7) 7 M. & W. 279.
(8) 10 Cl. & F. 934.
(9) 10 C. B. 35; 20 L. J. C. P. 49.
(10) Kay, 280; 23 L. J. (Ch.) 434.
(11) 10 Ex. 675; 24 L. J. (Ex.) 145.
(12) 4 L. T. (N.S.) 180; 13 Irish C. L. Rep. 305.
(13) 5 H. & N. 235; affirmed 7 H. & N. 353.
(14) 8 Jur. (N.S.) 801; 6 L. T. (N.S.) 763; 15 Moore's P. C. Cas. 472.
(15) Law Rep. 7 Q. B. 666.
(16) Law Rep. 8 Ex. 73.
(17) 1 Q. B. D. 669.
(18) 9 Q. B. D. 653.

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1889. Jan. 30. The judgment of the Court (Denman and Stephen, JJ.) was delivered by

DENMAN, J. These two actions were tried together before Charles, J., at the last Durham winter assizes, when, after certain findings of the jury on questions left to them, the learned judge adjourned the case for further consideration. He afterwards heard the parties fully, and gave judgment for the plaintiffs, so far as the question of liability in both actions was concerned.

It was agreed that the question of damages should be disposed of in the manner agreed between the parties, so that no *final* judgment could yet be given, unless it be one in favour of the defendants.

In the first action the plaintiffs sued upon a bond given to them by one of the defendants and the testator of the other defendant, in their capacity of urban sanitary authority. In the second action the plaintiffs sued in the capacity of mayor and corporation, on another bond given by the same parties.

The first bond was given on February 4, 1882. It recited, so far as is material to the case, that one Goundry had in 1863 been duly appointed to be a collector of rates to be levied by the local authority (the plaintiffs) under the Public Health Act, and that he was required by the local authority to enter into a bond with two sureties for the faithful execution of such office and for duly accounting for all moneys which might be entrusted to him by reason thereof, that Fowler and Crighton (whom I will call the sureties) had assented to be the sureties; that the parties, particularly the sureties, thereby agreed that the appointment of Goundry as such collector should be admitted without further proof. After some further recitals followed the conditions:—

[The learned judge read the conditions of the bond of February 4, 1882, which are set out in the judgment of Charles, J., ante, p. 397, and also read the following additional condition contained in the same bond; "And if on resigning or being removed from the said office, or at any time when and as thereunto required by the authority by notice to him given or left at his usual or last known place of abode or business during his continuance in such office, the collector shall account for, deliver, and pay to the local authority or to such person as they may appoint

in that behalf, all books, papers, writings, vouchers, receipts, balances, moneys, property and things of or belonging or due to the local authority or relating to the execution of the said Public Health Act, 1875, above-mentioned, which shall be in his custody, possession or power by virtue of his said office or otherwise howsoever, without loss, abatement, fraud, or concealment . . . then such bond shall be void, but otherwise shall be and remain of full force and effect."]

The second bond was given on November 28, 1885, by the same parties to the corporation or council of the city of Durham. It contained several recitals of which the following are material. First, that on November 9, 1885, Goundry had been duly appointed collector and receiver for collecting and receiving the watch and borough rate made and to be made upon lands, &c., situate within certain parishes within the city; that it was his duty by virtue of such appointment to receive and collect for, or from time to time from, the overseers of the said parishes respectively, the sums of money for the time being levied and raised upon the said parishes in respect of the said watch and borough rates, and to pay the same to the treasurer for the time being of the said city; and that the sureties had agreed to be bound for the said Goundry under the conditions thereunder written; and that it was thereby agreed that all accounts, &c., made or rendered by Goundry of any moneys received by him by virtue of the said *offices* or *either* of them, or otherwise connected with the said rates, *whether strictly within the duties of the said offices or either of them or not*, should be good primâ facie evidence against the sureties as well as against Goundry of the receipt by Goundry of all sums in such accounts appearing to be due from him, and that the security should not be terminated or prejudicially diminished, altered, or affected by any alteration which should thereafter be made in the duties of the said Goundry as such collector and receiver as aforesaid or either of them. Then follow the conditions of the bond. The following are those which are material.

[The learned judge read the clauses in the bond of November 28, 1885, which are set out in the judgment of Charles, J., ante, p. 398.]

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In both actions the plaintiffs allege, amongst other breaches of the conditions of the bond, that Goundry had received large sums of money which he had kept for his own use, and not paid over, either within seven days of receiving them, or at all. The sums so kept were moneys received in respect of rates made at the following dates, viz. a borough rate made in February, 1886, and a district rate made in September, 1886. Inquiry being made into the matter it was found that Goundry had received and not paid over large sums on account of both these rates. On the discovery of these deficiencies Goundry was dismissed. He was afterwards prosecuted for embezzlement and convicted at the winter assizes of 1887, these actions having in the meantime been brought against the sureties.

In this state of things there can be no doubt that (subject to two questions raised by the defendants) the principal, Goundry, had been guilty of one or more breaches of the conditions of both bonds, for which the sureties would be liable. But the defendants contended that they were not liable, on the ground that the plaintiffs had so behaved as to discharge the sureties from their liability. It was also contended in respect of the second bond that the sureties were not liable, on a ground applicable to the second action only. This will be more conveniently dealt with after stating the facts relative to the defences which are raised as applicable to both bonds.

The facts proved at the trial were as follows:—

William Goundry was appointed by the local board in 1863 as collector of the district rates payable under the Public Health Act, 11 & 12 Vict. c. 63. That Act provided that every collector of such rates "shall within seven days after he shall have received any moneys on account of such rates pay over the same to the treasurer."

That provision is repeated in s. 195 of 38 & 39 Vict. c. 55. The plaintiffs as urban sanitary authority now occupy the place of the local board, and it may be taken that Goundry has in fact been the collector of the district rate until 1886, when the matters occurred which led to his dismissal, and that in fact he was never suspected of any dishonesty until the discoveries in that year which led to his dismissal. The evidence is all one

way upon this point. Before the bond of 1882 was given its provision relating to the payment of sums received within the seven days had not been acted upon, and in 1879 or 1880 the borough accountant, who had been appointed in the former year, having formed the opinion that Goundry's mode of keeping the accounts was not satisfactory, made suggestions (after inquiring as to the mode of keeping similar accounts in another borough) which in his cross-examination upon the trial he said if adopted and acted upon would have rendered the defalcations relied upon by the plaintiffs in these actions practically impossible. The plaintiffs, however, having referred the accountant's suggestions to the finance committee of the council, that body, on September 14, 1880, reported as follows:—[The learned judge read the report, which is set out in the judgment of Charles, J., ante, p. 396.]

The council adopted that report, but upon the same day passed a resolution: "That all sums of money collected and received by the collector for and on account of this council be paid to the treasurer of the council once a week." Notwithstanding this resolution Goundry did not act upon it, and we think it must be taken that the plaintiffs either knew or did not care to inquire whether he acted upon it or not. The evidence of the accountant on this point is as follows, and it is so important that it will be best to give it in his own words. On his cross-examination by Mr. Waddy for the defendants, after giving an account of the mode of dealing with the rate books, receipts, counterfoils, and excuse books, which was substantially the same as that which he, the accountant, had pronounced unsatisfactory in 1879–1880, and which gave the council no means of knowing at what dates moneys had been received by Goundry, and after stating that if his own recommendations had been carried out the frauds relied upon in this case would have been practically impossible, the witness gave the following evidence: "When I wanted money I used to go to Goundry and say what was required, and he would pay it in. The bank book shews the mode in which Goundry paid in moneys. They were paid in very variable sums. He must therefore have been keeping large sums in hand for a considerable time." The pass books were in evidence, and it is not contested

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that the learned judge's note of the result of their examination is correct. It is as follows:

"Borough Rate. No payment in after May. That appears from the pass-book. Pass-book produced for both rates. Borough rate for 1885. See book; large payments at close of time. *District Rate;* (the two books shew that as close of borough rate period came round Goundry paid in large sums, and nothing to district rate). Then when he had put borough rate in funds, he begins to pay in largely to district."

Then the witness proceeds: "Since my appointment" (i.e. since 1863, and in spite of the resolution of September 14, 1880), "the business has been carried on in the same way. It appears that Goundry was taking one rate to pay another. Goundry used to collect, in one application, district, borough, watch rate, poor-rate, arrears." After some further questions as to objections said to have been made, upon which the witness gave no definite answer, he was further cross-examined by Mr. Manisty, who appeared for Mrs. Crighton, the executrix of one of the sureties, and said, "The council at every meeting had the bank book to refer to. That brought to their notice that he did not pay in weekly." On re-examination the witness said: "It was Goundry's practice all along. I thought it irregular, but not dishonest. Till December, 1886" (i.e. after the two defalcations relied on), "when the book came into my hands, I did not think he was dishonest."

One of the auditors appointed by the ratepayers was also called as a witness for the plaintiffs, and he stated that Goundry's accounts were found to be correct up to January, 1886, and it was not disputed that the whole of the defalcations relied upon by the plaintiffs had arisen in respect of rates made subsequently to that time. He also corroborated the statement of the accountant that there was no means of discovering by the documents kept or furnished by Goundry the dates when he had received the moneys from the ratepayers. It was proved by several ratepayers that they had paid the rates to Goundry in February and September, 1886, which were afterwards discovered by the accountant not to have been paid over to the treasurer; but it was not necessary to exhaust the evidence on this point,

owing to the agreement at the trial that the damages in case of liability being established should be referred. At the end of the plaintiffs' case, Mr. Waddy, for the defendant Fowler, submitted that there could be no liability on the part of his client for the borough rate, on the ground that the rate itself was not legally made, and he then, and on the hearing on further consideration, relied upon several cases in support of his contention. There are, no doubt, certain cases in which it has been held that where a person undertakes to collect and pay over rates of a particular description, the creation of a certain Act or Acts of Parliament, and a bond is given for the due performance of his duties as such collector, the sureties cannot be held responsible for the non-payment of rates which he was not by the statute authorized to collect: see *Nares* v. *Rowles* (1); *Webb* v. *James* (2); *Kepp* v. *Wiggett.* (3)

The point so insisted upon turns upon the question raised as to the borough rate only, viz. whether as collector of that rate Goundry had any authority to collect from the individual rate-payers, or whether his duty was not merely to receive from the overseers of the several parishes enumerated in the second bond the lump sums which such overseers were by the precepts ordered to pay, and to hand these sums over to the treasurer. The learned judge, having heard the question argued, came to the conclusion that, although the original resolution for the rate in question might be wrong in ordering Goundry to collect it, the rate was not rendered bad by the error in the resolution, and that having in fact collected the rate from the overseers, he was in possession of money for good rates, lawfully assessed, and bound to pay them over to the treasurer.

The learned judge added that he thought there was much force in the argument addressed to him on the language of the bond, "which seems to cover the case of moneys received in fact, even though received under an invalid rate." (4)

We do not think it necessary to say more, upon the question of the validity of the rate itself, than that we see no reason to disagree with the view taken by Charles, J. of the question, but we

(1) 14 East, 510.
(2) 7 M. & W. 279.
(3) 10 C. B. 35.
(4) Ante, p. 406.

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are also strongly of opinion that the words of the bond are clearly intended, and sufficient, to cover the receipt and payment over of the rates in question. The bond states that Goundry was appointed receiver as well as collector of these rates, and that he had entered into the bond for the faithful execution "of his said offices," in the plural, and that it was his duty to receive and collect, *for*, or from time to time *from*, the overseers, the moneys raised, and "that all accounts &c., which should be kept by him of any moneys received by him by virtue of the said offices *or either of them, or otherwise connected with the said rates, whether strictly within the duties of the said offices or either of them or not*," should be evidence, &c. Again, in the conditions of the bond, he is to duly, attentively, and faithfully execute and perform the said *offices* of collector and receiver—to use his best endeavours to *receive* (inter alia) the borough rates, which it shall be his duty as such *receiver* to receive, and "to pay to the treasurer for the time being of the said city all sums of money which he shall receive on account of such rates at the times appointed from time to time by the order or precepts of the said mayor &c., *either* to the said William Goundry or the overseers of the said parishes." The latter words of course mean "according to the orders of the corporation as to time of payment." The bond is also conditioned as follows, "and shall pay to the treasurer for the time being all sums of money which he shall receive from time to time by virtue or on account of such last mentioned *offices*" (i.e. collector or receiver) "as soon as the same shall be received," and besides other conditions for his accounting, it is stipulated that he shall *when required* pay to the treasurer any moneys which may have been received by him and not paid *in respect of the said rates*, although the times mentioned in the orders or precepts should not have arrived. We think it impossible to hold that the sureties who were parties to a bond with such recitals and such conditions as these should have any right to contend that they were not responsible in such a case as the present, where Goundry was found to have had in his hands large amounts collected months before for borough rates, long after the time at which he ought to have paid them to the treasurer, supposing such time to have elapsed, merely because (even if the fact be) that in the first

instance he ought not personally to have collected them, but to have received them from the overseers in the lump. We think that the bond itself contemplated the very course which was taken down to the point of Goundry's receiving the moneys, and that the moneys, when once in his possession, were clearly subject to the condition that he was to pay them over to the treasurer, and not keep them for months so that he might at any time be found largely in arrear as compared with the moneys received. We think, therefore, that the defence which rested on the irregularity or the illegality of the rate itself wholly failed, and that the defendants have no better defence to the action in respect of the borough rate than they have in respect of the district rate, and the watch rate, as to which no such question arises.

This brings us to the defences raised by the defendants owing to the conduct of the plaintiffs themselves. These were of two kinds; one consisted of an objection that the bond contained recitals which the plaintiffs themselves must have known to be inaccurate, and that the sureties were thereby, and by concealment of the true state of things, deceived, and induced to enter into the relation of suretyship to their detriment. The other and more serious contention was that the sureties were discharged by the systematic neglect of several of the leading conditions of both bonds, acquiesced in by the defendants from the date of the bonds respectively, and continued down to the time of the discovery of the defalcations which led to the institution of these actions.

As to the former of these two heads of objection, it is sufficient to say that there was no evidence whatever to shew that any of the recitals in the bond were false. They may not perhaps be in every respect put into the most accurate language that could be used to describe the state of things existing at the time; but there is no evidence of any misstatement of any fact known to the plaintiffs and unknown to the defendants, nor of any concealment of any material fact which ought to have been disclosed. The recitals are the language of both parties, and must be taken, in the absence of any proof to the contrary, to be used with the full knowledge on the part of both of any facts they may state.

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As to the defence suggested by reason of conduct of the plaintiffs and Goundry *since* the date of the bonds, the question came before us in the shape of a notice of motion to enter a verdict for the defendants on two findings of the jury, or for a new trial on the ground that the verdict was against the weight of evidence, or that the learned judge had not left to the jury questions suggested by the defendants' counsel as being essential to the right decision of the case upon the evidence which was given.

Upon the questions left to them the jury found—

First, that the corporation *permitted* Goundry to retain moneys in his possession for a longer period than one week.

Secondly, that they *permitted* him to mix the proceeds of different rates.

It is not necessary to enumerate all the other questions which were suggested and rejected by the learned judge. It is enough to say that one was whether the corporation were guilty of negligence in the way in which they dealt with Goundry; another, whether such negligence enabled Goundry to commit the defalcations complained of; and another, whether there was *connivance* on the part of the corporation.

We think it clear that the two findings of the jury must, looking at the manner in which the questions were put to the jury, be considered to mean, as against the plaintiffs, that they permitted Goundry, in whatever sense the word "permitted" is to be understood, to go on during the whole time from 1880 to 1886 acting in the same way, and neglecting the conditions of the bond as to keeping proper accounts and as to paying over moneys received, either *within seven days* or *regularly within the time stipulated* for, as in the bonds respectively provided. On the other hand, it appears equally clear from the newspaper report of the trial, which both parties agreed to be correct, and the judge's notes—and the learned judge himself informs us—that he did not mean by the word "permit" anything more than passive acquiescence in what Goundry did, and that the jury could have meant no more consistently with the way in which it was put to them. In the printed note (page 20), to which we were referred by both parties, it appears that the learned judge, after having expressed his opinion that there was no evidence upon which he could

leave the question of *connivance* to the jury, said that he should ask the jury whether the corporation allowed Goundry to retain moneys in his hands for a longer period than one week, and that Mr. Atkinson, for the plaintiffs, added that he could not dispute *that*, whereupon the jury found as they did. It is clear that Mr. Atkinson never meant to admit more than passive acquiescence. It would, therefore, be impossible for us now to give judgment for the defendants on the ground that the case has been decided in their favour by these findings, for the cases abundantly shew that mere laches of the obligee, or a mere passive acquiescence by the obligee in acts which are contrary to the conditions of a bond, is not sufficient of itself to relieve the sureties: see as to laches, *Trent Navigation Co.* v. *Harley* (1); *Samuell* v. *Howarth* (2); and *Mactaggart* v. *Watson* (3), per Lord Brougham.

But the main contention of the defendants in this case was, that though mere laches, or mere acquiescence in a departure from the conditions of a bond on the part of the obligee, will not be sufficient to absolve the surety, there was evidence here from which the jury might not unreasonably have inferred that the corporation had so conducted themselves as to make it a case for the jury whether they had not, within the language of the last-mentioned case, *Mactaggart* v. *Watson* (3), and other cases to which I will presently refer, "either by their conduct prevented the things from being done, or connived at their omission, or enabled the person to do what he ought not to have done, or leave undone what he ought to have done, and that but for such conduct the omission or commission would not have happened." It may here be observed with regard to one contention of the plaintiffs' counsel, that he entirely failed to shew that there was any evidence to have justified a jury in deciding in favour of the plaintiffs on the ground only that the alleged laches, or negligence, or connivance of the plaintiffs was immaterial, as failing so bring the case within the words used by Lord Brougham in *Mactaggart* v. *Watson* (3), because the *particular* laches, &c., was not shewn to have "enabled the person to do

(1) 10 East, 34.

(2) 3 Mer. 272, per Lord Eldon at p. 278.

(3) 3 Cl. & F. at p. 543.

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what he ought not to have done, or leave undone what he ought to have done, and that but for such conduct the omission or commission would not have happened." The evidence was all one way upon this, at least so far as the non-payment of moneys to the treasurer was concerned, and it is too clear for argument that if the corporation had insisted on the regular weekly payments, as stipulated for by the first bond, or upon the payment to the treasurer, as stipulated for by the second bond, Goundry could never have kept in his hands the sums which were found to have been received and not paid over by him, and which were sought to be recovered by the plaintiffs against the sureties in this action. It is, therefore, necessary to consider whether there was evidence to be left to the jury upon the question suggested at the trial, and rejected by the learned judge, viz., whether the plaintiffs had *connived* at the departure from the conditions of the bond in a sense amounting to more than "mere passive inactivity," which must be taken to be all that the jury have actually found. Upon this question it is necessary to consider the cases somewhat closely, and I will refer to them in order of date, so far as they bear upon the question of connivance, beginning with the case of *Mactaggart* v. *Watson.* (1)

In that case the defendant had entered into a joint and several bond with the trustee of a bankrupt estate in 1000*l.*, conditioned that (amongst things) the trustee "should make payment for his whole receipts, &c." which he had systematically neglected to do. We do not find that in that case there was any evidence that the obligees in fact knew that the trustee was acting in violation of the conditions of the bond. Sir John Campbell's argument in favour of the surety puts it in the alternative, and I find that Lord Brougham in his judgment expressly decides the case, after laying down the law as above mentioned, on the ground that the facts were not there (i.e., the necessary facts not proved) to govern the conclusion required to be drawn (3 Cl. & F. 543), and in the report in 10 Bli. (N.S.) at p. 625, the expression as reported is "the present is anything rather than such a case." It must be admitted, however, that there were strong facts shewing systematic neglect and omission to insist upon the provisions

(1) 3 Cl. & F. 525.

of the bond, and that the principle is strongly laid down that the surety has no right to shelter himself even under a long course of omissions by the obligee to see to the performance of the conditions for the performance of which the surety has bound himself by way of giving a security in addition to the covenants of the person for whom he becomes answerable. The case of *Mactaggart* v. *Watson* (1) has been regarded as the leading authority for years.

In 1854 the case of *Dawson* v. *Lawes* (2) was decided by Wood, V.C. We cannot say that that case lays down a very certain definition of what will be evidence of connivance according to the judgment of Lord Brougham in *Mactaggart* v. *Watson* (1), because in p. 301 of his judgment, after citing Lord Brougham's words from 3 Cl. & F., the Vice-Chancellor adds the ambiguous expression "all these remarks point to active connivance amounting in fact, as it would do in such a case, *almost, if not entirely,* to a fraud on the part of the persons and particular officers who were so conducting themselves," by which word "fraud" we understand unfair conduct *towards the sureties,* but at p. 307 he says "there must be, as Lord Brougham expresses it, such an act of connivance as enables the party to get the fund into his hands," which is a somewhat different thing; but it is clear that Wood, V.C., draws a great distinction between affirmative and negative misconduct, and that when he deals with the latter he imposes a further condition in order to absolve the surety from liability, for he adds to the words I have last quoted (on page 307) the words "or such an act of gross negligence as to amount to a wilful shutting of the person's eyes *to the fraud* which the party is about to commit." This case again is one in which the Vice-Chancellor was, of course, jury as well as judge; but, inasmuch as the evidence in the present case fails to shew that the plaintiffs had the least suspicion that Goundry was at all likely to commit the frauds committed, it was we think rightly cited as a strong authority for the plaintiffs.

The Irish case of *Madden* v. *McMullen* (3), decided in 1861 on demurrer to an equitable plea stating strong facts of gross negli-

(1) 3 Cl. & F. 525.

(2) Kay, 280.

(3) 4 L. T. (N.S.) 180.

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gence in allowing the party to retain moneys in his hands in contravention of the condition of the bond, may perhaps not be regarded as a decision in point, inasmuch as the word "connivance" is not in the plea demurred to, but the view taken of the meaning of that word does not differ from that expressed by Wood, V.C., in any way so as to make it more easy to establish a defence on that ground.

Lord Kingsdown's judgment in *Black* v. *Ottoman Bank* (1) puts the matter thus, after referring to several other cases: "From these cases it is clear that upon the point now in dispute the rule at law and in equity is the same; that the mere passive inactivity of the person to whom the guarantee is given, his neglect to call the principal debtor to account in reasonable time, and to enforce payment against him, does not discharge the security; that there must be some positive act done by him to the prejudice of the surety, or such degree of negligence, as, in the language of Wood, V.C., in *Dawson* v. *Lawes* (2), to imply connivance and amount to fraud." Here, again, the language must be understood to mean at least connivance in acts *contemplating* the probability of a defalcation, and so being guilty of a fraud upon the sureties, in the sense of assisting an act which *must* be detrimental to *them*.

The only difficulty we have felt in the way of deciding, as the learned judge did, that there was no evidence to go to the jury beyond that of mere acquiescence, or mere quiescence, or mere passive inactivity, to use the different expressions by which the same thing has been described, arose from the cases cited by Mr. Walton for the defendants, but on consideration we think that they none of them contain anything sufficient to shew that in the present case there was more than great negligence in trusting Goundry to go on without better accounts and without more regular and prompt payments to the treasurer. The negligence certainly appears to be mainly that of the treasurer himself, who after 1880 seems to have quietly contented himself with receiving such sums as he wanted at long intervals. It cannot be said that the sureties were kept in the dark as to the state of things in 1882 and 1885, when the bonds were given.

(1) 6 L. T. (N.S.) 763. (2) Kay, 280.

They expressly stipulated that the payments should be made within the times mentioned in the bonds, or that they should be responsible. There is no evidence of any *concealment* of the true state of things from the sureties. It is mere non-communication. But it was contended that the allowance of, or non-interference with, such a departure from many of the conditions of the bond as undoubtedly took place throughout, was equivalent to a substitution of a different *bargain* with the principal, to the detriment of the surety, which, like an agreement to give time, would, it was contended, release the surety. We are unable to see that this contention can be made consistently with the cases already cited.

The strongest case which was relied upon for the defendants was the case of *Railton* v. *Mathews* (1), in which the sureties for the conduct of an agent were held to be discharged because of the non-communication to the surety, *at the time* of the execution of the bond, of facts known to the obligees and unknown to him, which shewed that the agent had prior to the bond behaved *dishonestly* in the agency.

Again, in *Phillips* v. *Foxall* (2) it was held that a surety was discharged where the obligee continued the party whose honesty was guaranteed in his service after knowledge of his dishonesty, without communication of the discovery of his dishonesty to the surety. But we think that Mr. Granger drew a sound distinction between a case of dishonesty and a case such as this, in which, so far as the obligees were concerned, there was no evidence that they even suspected dishonesty, and where, until the discoveries were made which led to his prosecution, the evidence was all one way, viz., that his accounts had, as to the one bond for four years, and as to the other for a whole year, been found correct by the accountant and auditors, whose business it was to examine them.

But in addition to these cases, Mr. Walton strongly relied upon the case of *Sanderson* v. *Aston* (3), in which the Court of Exchequer do certainly appear to have held, upon the supposed authority of *Phillips* v. *Foxall* (2), that a plea stating that the obligee of a bond who had continued in his service a clerk and

(1) 10 Cl. & F. 934. (2) Law Rep. 7 Q. B. 666.
(3) Law Rep. 8 Ex. 73.

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traveller who had failed to pay over sums received by him, contrary to the condition of the bond that he should well and satisfactorily account for and pay over to the plaintiff all sums received for the plaintiff's use, and that the plaintiff, *though well knowing* the said defaults, wholly omitted and neglected to inform the defendants thereof, and continued to employ the clerk in his service, was a good plea to an action on the bond for the breaches subsequent to the time when the plaintiff knew of the previous defaults. That case was decided entirely on the supposed ground that *Phillips* v. *Foxall* (1) had held "that if any default or breaches of duty, *whether by dishonesty or not*, have been committed by the employed against the employer, under such circumstances that the employer might have dismissed the employed, the surety is entitled to call on the employer to dismiss him." (2) But on referring to the case of *Phillips* v. *Foxall* (1), though it is true that that most learned Judge, Blackburn, J., rested his judgment upon the ground that the surety was released by reason of his being deprived of a security by reason of the master in that case having waived his right of dismissal by *entering into a fresh agreement* with his servant after knowledge of his dishonesty, there is nothing to shew that Blackburn, J., would have held the same in the case of a mere default; his words are (at p. 680): "On discovering that the servant is guilty of a fraud;" and he approves of the doctrine so laid down by Malins, V.C., in *Burgess* v. *Eve* (3), whose words upon the point are: "Provided that the clerk or other person has been guilty" (i.e., known to be guilty) "of embezzlement or gross misconduct, or has turned out to be unworthy of the confidence reposed in him by the person giving the guarantee for him." By "turned out to be," we understand the learned Vice-Chancellor to mean "to the knowledge of the obligee." Moreover, in the judgment of Cockburn, C.J., Lush, and Quain, JJ., in *Phillips* v. *Foxall* (4), we find this passage: "We intend our judgment to apply only to cases like the one now before the Court, where the master, having the power of at once dismissing the servant for *dishonesty*, deliberately continues

(1) Law Rep. 7 Q. B. 666.

(2) Law Rep. 8 Ex. at pp. 76, 77, per Kelly, C.B.

(3) Law Rep. 13 Eq. at pp. 457, 458.

(4) Law Rep. 7 Q. B. at p. 675.

him in his service after he becomes aware of *the dishonesty*, and without the assent or knowledge of the surety." We have, therefore, considerable doubt whether the case of *Sanderson* v. *Aston* (1), which was very little discussed, does not go much beyond the case of *Phillips* v. *Foxall*. (2) *Phillips* v. *Foxall* (2) itself was a much stronger case than the present, for there the master, with full knowledge of the delinquency of the servant, had, without the knowledge of the surety, made a fresh *agreement* to continue the servant in his employ, the servant paying him a certain sum per month in liquidation of the previous defalcations and embezzlements (p. 669 of the report in Law Rep. 7 Q. B.) On the whole, we find it impossible to reconcile the decision in *Sanderson* v. *Aston* (1) with the cases cited for the plaintiffs, and referred to above. But even assuming it be a binding authority on an undistinguishable state of facts, we think that it is not an authority that in the present case there was evidence for the jury of such a defence as that which was held to be valid in that case. It was a decision only on demurrer, and decides only that the plea stated facts of non-payments, which were primâ facie a breach of duty which would have entitled the plaintiff to dismiss the person employed. It by no means follows that if all the facts of that case had been set out, there would upon the whole matter have been any case for the jury in support of the defence in question.

Even if the cases of *Phillips* v. *Foxall* (2) and *Sanderson* v. *Aston* (1) were applicable in other respects, we think that they are distinguishable in principle from the present case on a ground upon which the Court of Common Pleas in Ireland held the surety liable in the case of *Lawder* v. *Lawder and Others*. (3) That was an action on a bond given to the plaintiff, a county treasurer, by a high constable, as barony cess collector. The defaults consisted of lodging moneys in his own bank instead of the county bank, and retaining in his hands more than 100*l.* at a time, in violation of the conditions of the bond. The Court held that, though *Phillips* v. *Foxall* (2) would have applied if the plaintiff had been a private individual, the sureties were liable, because the treasurer merely sued in his official capacity, and no

(1) Law Rep. 8 Ex. 73. (2) Law Rep. 7 Q. B. 666.
(3) Ir. R. 7 C. L. 57.

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personal equity could be set up against him. It was, no doubt, there said: "He does not appoint the high constable, he cannot dismiss him. *Phillips* v. *Foxall* (1), and all such cases, are grounded on privity existing between the plaintiff and defendant." (2) Still we think that where the parties taking the bond are mere trustees for ratepayers, as the corporation here were, and the collector also a person who owed a duty to the ratepayers, the sureties who had guaranteed the proper discharge of his duties have no right to shelter themselves under the neglect of its duty by the corporation in not insisting on the fulfilment of the very conditions of the bond to which they are parties. The corporation may themselves be looked upon "as public officers" as much as was the treasurer in *Lawder* v. *Lawder and Others* (3). In the present case we have all the material facts elicited by the defendants' counsel. No others were suggested, and there is no reason to suppose that any facts could have been added, nor any dispute about the facts proved. Having these all before us, we have come to the conclusion that the learned judge was right in holding as he did after full argument,

(1.) That upon the findings of the jury, in the only sense in which the evidence could warrant those findings, there was no defence to the action; and

(2.) That upon the uncontradicted evidence for the plaintiffs, there was no other question which the learned judge could have been properly required to leave to the jury;

(3.) That upon the facts proved at the trial there was no defence to the action; and

Therefore that the judgment given by the learned judge for the plaintiffs for such damages as may be assessed by the tribunal agreed upon at the trial, must stand, and this motion be dismissed with costs.

Motion dismissed.

Solicitors for plaintiffs: *Harvey & Capron, for W. Marshall, Town Clerk of Durham.*

Solicitors for the defendant Fowler: *Oldman & Clabburn, for Ralph Simey, Sunderland.*

(1) Law Rep. 7 Q. B. 666. (2) Ir. R. 7 C. L. at p. 63.
(3) Ir. R. 7 C. L. 57.

P. B. H.

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Jan. 23.

Practice—Penal Action—Discovery—Discovery of Documents—Action for Treble Damages for Pound Breach and Rescue under 2 *Wm. & M. sess.* 1, *c.* 5, *s.* 4 *—Rules of Supreme Court*, 1883, *Order* XXXI., *rr.* 12, 13.

An action for pound-breach and rescue of chattels distrained for non-payment of tithe rent-charge, in which the plaintiff claims treble damages under 2 Wm. & M. sess. 1, c. 5, s. 4, is a penal action, and the plaintiff is therefore not entitled to an affidavit of documents.

APPEAL of the defendant against a master's order for an affidavit of documents referred to the Court by Cave, J., at chambers.

It appeared from the statement of claim that the action was brought by the plaintiff, the rector of a parish in Anglesey, against the defendant, the occupier of a farm, for pound breach and rescue of certain hay and straw which had been distrained by the plaintiff for non-payment of tithe rent-charge. The amount due in respect of tithe rent-charge and the costs of the distress was stated to be 40*l.* The plaintiff's claim was for 120*l.*, treble damages under 2 Wm. & M. sess. 1, c. 5, s. 4.

Malcolm Douglas, for the defendant. The order ought not to have been made. The treble damages sued for are imposed by 2 Wm. & M. sess. 1, c. 5, s. 4 (1), as a punishment upon the "offender" and not as compensation to the "person grieved." The action is therefore brought to recover a penalty: *Earl Spencer* v. *Swannell.* (2) The rules which regulate discovery under the Judicature Acts are taken from the rules of equity, and a bill in equity in aid of an action brought to recover a penalty was demurrable. In *United States of America* v. *Macrae* (3), Wood, V.-C., points out that discovery was never granted in equity in actions for damages for waste or for the recovery of

(1) By 2 Wm. & M. sess. 1, c. 5, c. 4: "Upon any pound breach or rescue of any chattels distrained for rent the person or persons grieved thereby shall, in a special action on the case for the wrong thereby sustained, recover his or her treble damages and costs of suit against the offender or offenders in any such rescue or pound-breach, any or either of them, or against the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession."

(2) 3 M. & W. 154.

(3) Law Rep. 4 Eq. 327.

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tithes unless upon a waiver by the plaintiff of his claim to treble damages or treble value.

[He also cited *Martin* v. *Treacher* (1) and *Hunnings* v. *Williamson.* (2)]

J. M. E. Lloyd, for the plaintiff. The order is right. It is submitted that the rule in equity only applied to actions for penalties in which the plaintiff was a common informer. In *Adams* v. *Batley* (3) Lord Esher, M.R., treats the reluctance of the Courts of Equity to assist common informers as the "foundation of the doctrine." Here the plaintiff is a "person grieved" to whom the statute gives a civil remedy, and, as such, he has an absolute right to an affidavit of documents by the defendant. If the defendant has documents in his possession which he objects to produce he should make his objection in his affidavit. In the case of interrogatories the objection that the party cannot answer without exposing himself to criminal proceedings must be taken in the affidavit in answer: *McFadzen* v. *Mayor and Corporation of Liverpool* (4); *Webb* v. *East.* (5)

[He also cited *Bunn* v. *Bunn* (6), and *Fisher* v. *Owen* (7).]

LORD COLERIDGE, C.J. I am of opinion that the order made in this case on the application of the plaintiff for an affidavit of documents by the defendant must be rescinded.

There is an obvious distinction between the position of a party who has had an order of the Court made against him and that of a party who is seeking to prevent an order of the Court from being made against him. The learned counsel for the plaintiff has ingeniously supported the decision of the master by referring to cases in which it has been held that if a party who is being interrogated under an order of the Court desires to object to answer an interrogatory he must make his objection on oath in his affidavit in answer. Decisions as to interrogatories are sometimes, though by no means always, worth consulting where questions as to discovery are concerned, because the same objections apply in both cases. But the question here is not as to

(1) 16 Q. B. D. 507.
(2) 10 Q. B. D. 459.
(3) 18 Q. B. D. 625, p. 630.
(4) Law Rep. 3 Ex. 279.
(5) 5 Ex. D. 23.
(6) 4 De G. J. & S. 316.
(7) 8 Ch. D. 645.

interrogatories but as to an affidavit of documents, and the defendant is not in the same position as the parties in the cases as to interrogatories which have been cited. Had he submitted to the order in question he must, no doubt, have made his objections in his affidavit. This is common knowledge. But here the defendant contends that he cannot under the peculiar circumstances of the case be called upon to make an affidavit of documents at all, and that for this reason the order applied for by the plaintiff ought not to have been made at chambers.

Now according to the argument for the plaintiff this order should be made as of course against the defendant on the application of the plaintiff in every action except it appears that the plaintiff is a common informer, who is suing for a penalty. In any other case there is no room for argument, and the order is to be made as a matter of routine. I cannot accede to this view, and I feel certain as to what is the true principle. The true principle in my opinion is that the liability of a defendant to file an affidavit of documents depends upon whether the action in which the application is made is or is not a penal action.

Here the statement of claim is framed with candour. The value of the tithe for which the plaintiff distrained is stated to be 40*l.* Therefore 40*l.* would have been adequate compensation to the plaintiff for the loss of the distress of which he complains. His claim is, however, not for 40*l.* but for 120*l.*, that is for 80*l.* more than is due, and he claims the 120*l.* as "treble damages" under a statute which gives "treble damages" to a "person grieved" by pound breach and rescue against the "offender." "Treble damages" cannot possibly be compensation to the person grieved, and are plainly inflicted on the offender as a punishment. In other words they are a penalty. The plaintiff is as much suing for a penalty as if he sued for a penalty eo nomine, and this application for an affidavit of documents is therefore made by the plaintiff in a penal action.

The cases appear to me to shew that it was a fixed principle of procedure in equity to refuse a bill of discovery in aid of a penal action. The rule was that the plaintiff, in order to entitle himself to relief, must shew either that he was not bringing a penal action, or that, if he was bringing a penal action, he waived the penalty

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or the forfeiture as the case might be. Within my memory the power to compel discovery could only be exercised by the Court of Chancery. This was found highly inconvenient, and many years before the Judicature Acts the legislature conferred the power on the Courts of Common Law. In the exercise of the jurisdiction the rules of equity, though not absolutely binding, were accepted by the Courts of Common Law as their guide. In *Pye* v. *Butterfield* (1), a case in which the Court of Queen's Bench after careful consideration refused to allow a plaintiff in ejectment to interrogate the defendant on the ground that his answers might subject him to forfeiture, Cockburn, C.J., expressed the solemn adhesion of the Court to the rules of equity on the subject of the application. The Judicature Acts enacted no new principle. They fused the Courts of Common Law and Equity into one great Court, and enacted that where the rules of equity were at variance with those of common law the rules of equity were henceforth to prevail. But substantially when those Acts passed the rules of equity as regards discovery had long already prevailed in the Courts of Common Law, and these rules are as binding on us as they would have been before the Judicature Acts.

The case of *Adams* v. *Batley* (2), notwithstanding a passage which has been cited from the judgment of the present Master of the Rolls, is in my opinion an authority against this order. That was an action brought by a person claiming the sole right to perform a piece of music to recover as damages from a person who was alleged to have performed it without his authority a sum of 40*s.* allowed under such circumstances by 3 & 4 Wm. 4, c. 15, s. 2. A Divisional Court held, and the Court of Appeal affirmed the decision, that the plaintiff was entitled to administer interrogatories to the defendant, on the express ground that the sum sued for under the statute was not a penalty. In the same way here, because the sum sued for is a penalty, the plaintiff has no right to an affidavit of documents. We cannot depart from a salutary rule based on the soundest principles. If a defendant in a penal action were liable to specify on oath the documents which he objects to produce, the very mischief might ensue which it was the practice of Courts of Equity to prevent. The whole

(1) 5 B. & S. 829; 34 L. J. (Q.B.) 17. (2) 18 Q. B. D. 625.

case for the plaintiff may depend upon his power to trace a particular document into the possession of the defendant, and, upon its non-production, to prove its contents by secondary evidence. The appeal must be allowed.

HAWKINS, J., concurred.

Appeal allowed.

Solicitor for plaintiff: *J. Shearman.*

Solicitors for defendant: *Indermaur & Brown, for Rowland, Bangor.*

H. D. W.

[IN THE COURT OF APPEAL.]

Feb. 13.

CROWE *v.* PRICE.

Practice—Execution—Equitable Execution—Receiver—Retired Pay of Officer—Sum paid to Officer in respect of Commutation of retired Pay—Pensions Commutation Act, 1871 (34 & 35 *Vict. c.* 36), *s.* 10—*Army Act*, 1881 (44 & 45 *Vict. c.* 58), *s.* 141.

A sum standing in the Bankruptcy Estates Account at the Bank of England to the credit of the judgment debtor, a retired deputy-commissary in the army, on the annulment of his bankruptcy, consisted partly of a sum paid to the trustee out of the retired pay of the judgment debtor, partly of a sum paid to the trustee out of money paid by the Paymaster-General in respect of the commutation of a part of his retired pay:—

Held, by the Queen's Bench Division, that the judgment creditor was entitled to an order for the appointment of a receiver in respect of the sum arising from commutation money, but not in respect of the sum arising from retired pay:—

Held, by the Court of Appeal, on appeal by the judgment creditor, as to the sum arising from retired pay, that the judgment of the Queen's Bench Division was right.

APPLICATION by the plaintiff as judgment creditor for the appointment of a receiver in respect of the sum of 225*l.* standing to the credit of the estate of the defendant the judgment debtor in the Bankruptcy Estates Account at the Bank of England.

It appeared that the defendant was a retired deputy-commissary in the army, and that this sum had been placed to the credit of his estate on the annulment of his bankruptcy upon payment of a composition. The defendant was in receipt of 14*s.* a day as retired pay under clause 52, s. 28, of the Royal Warrant of Feb. 4,

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1880. He was liable to be recalled to active service, and in case of his holding any military or civil office under the Crown his salary would be reduced by the amount of his retired pay. The fund consisted as regards 109*l.* of a balance of payments of 5*l.* a month made to the trustee out of the defendant's retired pay by the Paymaster-General under an order in the bankruptcy; as regards 116*l.* of a balance of a sum paid by the Paymaster-General to the trustee arising from the commutation of an amount of the defendant's retired pay equal to 4*s.* a day.

S. Woolf, for the judgment debtor. A receiver ought not to be appointed as regards either sum. The pension is inalienable under s. 141 of the Army Act, 1881 (1), and therefore cannot be attached: *Lucas* v. *Harris* (2); *Birch* v. *Birch*. (3) The commutation money represents the capitalised value of a part of the pension, and is also, it is submitted, inalienable under the section. It is as much against the policy of the law that commutation money should be assignable as that a pension should be assignable, and the two payments are placed on the same footing in s. 10 of the Pensions Commutation Act, 1871. In *Birch* v. *Birch* (3) the sum dealt with by the Court consisted, according to the report, partly of a pension, partly of commutation money, and it would appear that commutation money was there held to be inalienable, and therefore not liable to sequestration.

(1) By the Army Act, 1881 (44 & 45 Vict. c. 58), s. 141: "Every assignment of and every charge on, and every agreement to assign or charge any deferred pay, or military reward payable to any officer or soldier of any of Her Majesty's forces, or any pension, allowance, or relief payable to any such officer or soldier, or his widow, child, or other relative, or to any person in respect of any military service, shall, except so far as the same is made in pursuance of a royal warrant for the benefit of the family of the person entitled thereto, or as may be authorized by any Act for the time being in force, be void."

By the Pensions Commutation Act, 1871 (34 & 35 Vict. c. 36), s. 10: "If any pension holder whose pension has been commuted in pursuance of this Act accepts any public employment, a deduction shall be made from the salary payable to him in respect of such employment equal to the amount which would have been abated from the pension if it had not been commuted; and, in the event of his becoming entitled to a pension in respect of such employment, the amount of such pension granted to him shall not exceed the amount which he might have received had his pension not been so commuted."

(2) 18 Q. B. D. 127.

(3) 8 P. D. 163.

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Whateley, for the judgment creditor. Both sums are liable to attachment. The effect of s. 141 of the Army Act, 1881, is to render void assignments of or charges upon sums payable in futuro in respect of military pensions. The section has no application to a sum which has been received on account of a military pension. Such an allowance, after it has come into the hands of the person entitled to it, is mere money, and may be taken in execution. As to the commutation money, s. 141 of the Army Act, 1881, does not mention commutation money, and the sum is therefore alienable and liable to seizure.

LORD COLERIDGE, C.J. The order of the Court must be different as regards the two sums of which this fund is composed. One is part of the pension paid by the State to the defendant, a retired military officer. The other is a sum which has been paid by the State in respect of a portion of his pension which he has been allowed to commute.

As regards the sum which represents payments to the defendant in respect of his pension, the application of the plaintiff must fail. This sum cannot be taken in execution. The case is governed by s. 141 of the Army Act, 1881. That section removed the distinction drawn by the common law between pensions awarded to servants of the Crown entirely as a compensation for past services, and allowances, such as half-pay, in which a part of the consideration was the liability of the recipient to serve the Crown again. The former class of allowances the common law regarded as alienable, the latter as inalienable, because granted for the express purpose of enabling persons who might be again employed in the service of the Crown to maintain a decent position and to avoid falling into poverty. Under the section "every assignment of and every charge on . . . . any deferred pay or military reward, or any pension, allowance or relief," is declared to be void. *Birch* v. *Birch* (1) and *Lucas* v. *Harris* (2) are decisions on this section. In *Birch* v. *Birch* (1) Sir James Hannen held in the Probate Division that the pension of an officer payable, as the defendant's pension is payable, under the section, was not liable to sequestration. In *Lucas* v. *Harris* (2)

(1) 8 P. D. 163. (2) 18 Q. B. D. 127.

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the Court of Appeal expressed approval of this decision. A receiver therefore cannot be appointed in respect of the sum which represents part of the defendant's pension.

The sum derived from the commutation of a part of the defendant's pension is subject, as it appears to me, to wholly different considerations. It was indeed suggested in argument by the counsel for the judgment debtor, that the question came before the Probate Division in *Birch* v. *Birch*. (1) I therefore communicated with Sir James Hannen. I know the precision with which that learned judge prepares his decisions, and I did not think it likely that, if he had intended to decide the point, he would have done so otherwise than in express terms. His answer is that in *Birch* v. *Birch* (1) the question of the liability of commutation money to attachment did not in any way arise. I have received the same answer to the same question from Lindley, L.J., as regards *Lucas* v. *Harris*. (2) Apparently, therefore, there is no authority. But I think that the judgments in both those cases shew that had the question arisen in them it would have been decided as I propose to decide it. In my opinion sums arising from the commutation of military pensions are not within either the words or the intention of s. 141 of the Army Act, 1881. The section enumerates certain allowances to officers and soldiers which it declares to be inalienable. Sums arising from the commutation of pensions are not mentioned. They are not therefore within the words of the section. As regards the intention of the section its effect is, as I have said, to remove the distinction which had existed at common law between two classes of pensions, and to render both classes equally inalienable. When the Army Act, 1881 passed, commutation of pensions, which had been established by the Pensions Commutation Act, 1871, must have been a well-known process. The silence of s. 141 shews, as it seems to me, either that the legislature deliberately did not place commutation money on the same footing with the allowances which it specifies, or that the legislature in altering the law did not take commutation money into consideration. The result is that commutation money is alienable, and is consequently liable to be taken in execution.

(1) 8 P. D. 163. (2) 18 Q. B. D. 127.

A receiver will therefore be appointed in respect of that part of the fund which consists of commutation money, but not in respect of that part of it which consists of retired pay.

HAWKINS, J., concurred.

Order accordingly.

H. D. W.

The judgment creditor appealed. (1)

1889. Feb. 13. *Herbert Reed*, for the judgment creditor.

Sidney Woolf, for the judgment debtor.

The arguments were the same as in the Divisional Court, the case of *Flarty* v. *Odlum* (2) being cited in addition to those cited below.

LORD ESHER, M.R. I adhere to the opinion expressed by this Court in *Lucas* v. *Harris* (3), that s. 141 of the Army Act, 1881, was passed in favour of officers and soldiers on grounds of public policy, and that it must be construed so as to protect pensions granted to them for their services. The question in the present case is, whether this sum of 109*l.* has ceased to be pension, for, if it has not, it is money which could not be taken in equitable execution. It is money which came from the Crown as pension, and which was on its way to the defendant, to be received by him as pension; but the Court of Bankruptcy intercepted it on its way to the officer; it was not paid to him, nor to any agent of his, nor with his consent to anybody. The order of the Bankruptcy Court prevented it from being paid to the officer, and stopped it against his will; but it was stopped for a particular and limited purpose, that of paying the creditors in the bankruptcy. On the annulment of the bankruptcy, that limited purpose came to an end; the money could be applied to that purpose no longer. Therefore when the order by which the money was intercepted came to an end, it seems that the balance remained in the hands of the Bankruptcy Court as pension which had been

(1) A cross notice of appeal was given by the judgment debtor against so much of the order as appointed a receiver of the commutation money, but was abandoned without argument.

(2) 3 T. R. 681.

(3) 18 Q. B. D. 127.

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intercepted on its way to the officer. The pension has not been paid to him, and so long as that is the case it cannot be assigned or taken in execution. In *Lucas* v. *Harris* (1) Lindley, L.J., says in his judgment: "The Court was asked to appoint a receiver of the sums which became due and payable in October last. But that would not be right, for they would have been paid to the defendant in the ordinary course before now, if it had not been for the order under appeal, which order ought never to have been made." That language is strictly applicable to the present case, for it is clear that this money would have been paid to the defendant in the ordinary course but for the intercepting order of the Court of Bankruptcy; it was and is pension on its way from the Crown to the defendant. The appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. The pension was really not paid to the defendant, and if it were necessary to decide the point I should say that it was still payable to him. What happened in the present case was shortly this: an order was made under s. 53, sub-s. 2, of the Bankruptcy Act, 1883, under which part of the pension was paid to the trustee in the bankruptcy, to be applied to such purposes as the Court should direct; these included the payment of certain of the creditors. These purposes failed when the bankruptcy came to an end. What, upon the happening of that event, was the nature of this money? It had never been received by the defendant; it had been intercepted by an order obtained by a third person, and had been received by the trustee for special purposes, which could not be carried out. The Court of Bankruptcy might have decided to pay the money back to the Paymaster-General, for it had been received from him for a purpose to which it could not be applied; but at any rate neither the officer nor any agent of his ever had it; it continued to be pension, which he had no power to assign, and which could not therefore be taken in execution.

FRY, L.J. I am of the same opinion. This money remained pension, of which one may use the expression that it had not

(1) 18 Q. B. D. 127.

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been "reduced into possession." It might be different if the officer had received it, and had paid it into his bankers, or had bought furniture with it. But this did not happen; the money was intercepted for a limited purpose, which came to an end while the money was still on its way to the officer, and it never lost its character of pension.

Appeal dismissed.

Solicitors for judgment creditor: *Ashurst, Morris, Crisp & Co.*
Solicitor for judgment debtor: *S. Gissing Skelton.*

W. J. B.

THE BIRMINGHAM AND DISTRICT LAND COMPANY *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Jan. 19.

Practice—New Trial—Compensation for Land—Issue tried in High Court—Regulation of Railways Act, 1868 (31 & 32 *Vict. c.* 119), *ss.* 41, 43.

The Court has no power to grant a new trial of an issue directed under s. 41 of the Regulation of Railways Act, 1868, to determine the right of compensation for lands taken for the purposes of a railway.

MOTION for a new trial of an issue to determine right to compensation for lands taken by the defendants for the purposes of their railway.

By s. 41 of the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119): "Whenever, in the case of any lands purchased or taken otherwise than by agreement for the purposes of any public railway, any question of compensation in respect thereof, or any question of compensation in respect of lands injuriously affected by the execution of the works of any public railway, is under the provisions of the Lands Clauses Consolidation Act, 1845, to be settled by the verdict of a jury empannelled and summoned as in that Act mentioned, the company or the party entitled to the compensation may, at any time before the issuing by the company to the sheriff as by that Act directed, apply to a judge of any one of the superior courts of common law at Westminster, who shall, if he think fit, make an order for trial of the question in one of the superior courts upon such terms and in such manner as to him shall seem fit; and the question between the parties shall be stated in an issue to be settled in

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case of difference by the judge, or as he shall direct, and such issue may be entered for trial and tried accordingly in the same manner as any issue joined in an ordinary action at such place as the judge shall direct; and the proceedings in respect of such issue shall be under and subject to the control and jurisdiction of the Court as in ordinary actions therein, but so nevertheless that the jury shall, where the issue relates to the value of lands to be purchased, and also to compensation claimed for injury done or to be done to lands held therewith, deliver their verdict separately in manner provided by the forty-ninth section of the Lands Clauses Consolidation Act, 1845."

By s. 43: "The verdict of the jury and judgment of the Court upon any issue authorized by this Act shall, as regards costs and every other matter incident to or consequent thereon, have the same operation and be entitled to the same effect as if that verdict and judgment had been the verdict of a jury and judgment of a sheriff upon an inquiry conducted upon a warrant to the sheriff issued by the company under the Lands Clauses Consolidation Act, 1845."

The defendants having given notice of their intention to take certain lands of the plaintiffs for the purposes of their railway, an order was made under s. 41 directing an issue to determine the amount of compensation to be awarded to the plaintiffs, and at the trial at Birmingham before Charles, J., and a special jury judgment was given for the amount of the verdict. The defendants now moved for a new trial.

Jelf, Q.C., *Alfred Young*, and *Hugo Young*, for the plaintiffs. There is a preliminary objection to the hearing of this motion. There is no right to a new trial of an issue directed under this section. Sect. 43 of this Act gives the same effect to the verdict and judgment of the Court (which means the Court that tries the issue) as that given to the verdict of a jury and judgment of a sheriff in an inquiry under the Lands Clauses Act, which are final, except so far as they may be subject to review by certiorari. The provision in s. 41 that the proceedings shall be subject to the control and jurisdiction of the Court as in ordinary actions therein only relates to the control of the proceedings at the trial

of the issue up to judgment, and gives no jurisdiction to the High Court which it has not over proceedings under the Lands Clauses Act.

H. D. Greene, Q.C., and *Leigh Clare*, for the defendants. The intention of s. 41 was to subject all the proceedings in an issue to the control of the superior Court just as though the issue were an ordinary action, and to order a new trial of the issue is a proper exercise of control by the superior Court. As soon as an issue is directed the case is withdrawn from the sheriff, and the parties have all the benefits of the High Court procedure. The provision in s. 43, that the verdict and judgment are to have the same operation as the verdict and judgment in a sheriff's inquiry, only means that they are to be deemed records as provided in the case of a sheriff's inquiry by s. 50 of the Lands Clauses Act.

Jelf, Q.C., in reply.

DENMAN, J. I think it is quite clear that this motion must be refused. It is an attempt to deal with a verdict and judgment under s. 41 of the Regulation of Railways Act as though they were a verdict and judgment in an ordinary action at Nisi Prius, and it amounts to a claim on the part of the defendants to a right to upset the verdict and judgment on any grounds which would be available for a like purpose in an ordinary action. It was not the intention of the statute to give the parties any such right. I was indeed at first impressed with the notion that the word "control" in s. 41 must be read in the wide, rough sense contended for by the defendants, so as to enable the Court to set aside the verdict and judgment in these cases if they were wrong; but having regard to the whole enactment, and especially to ss. 41 and 43, it seems clear that the control of the Court cannot have so large an operation, and that the meaning of the word must be confined to the control of the proceedings in the issue so long as they are actually going on, and that it cannot extend to proceedings after judgment. Knowing the history of these cases, it is quite clear that this was the intention of the legislature. It is clear law that the verdict and judgment in a sheriff's inquiry cannot be inquired into on an application for a new trial; there is no machinery for dealing so with them, and they were intended

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to be absolutely final except in cases where the jury or the sheriff had acted without jurisdiction. The meaning which I place upon s. 43 is, that the verdict and judgment in an issue are to be as valid, and as free from liability to be set aside on ordinary grounds, as are the verdict and judgment when the case is tried by a sheriff and jury, and this seems to be the only meaning which will make sense of both enactments.

STEPHEN, J. I agree. The operation of the Act of 1868 on the then existing law under the Lands Clauses Act was this; it authorized a judge, if he should think fit, to substitute the tribunal of a judge and jury for that of a sheriff and jury under the Act of 1845; and as the one procedure is not open to a motion for a new trial on the ordinary grounds, the same is the case with the other.

Motion refused.

Solicitors for plaintiffs: *Rowlands & Co., Birmingham.*
Solicitor for defendants: *C. H. Mason.*

W. J. B.

Feb. 16.

McENTIRE AND ANOTHER *v.* POTTER & CO.

Bankruptcy—Title of Assignees in Irish Bankruptcy—Money paid to Bankrupt without Notice of Adjudication—Liability of innocent Agent—Irish Bankruptcy Act, 1857 (20 & 21 *Vict. c.* 60), *s.* 267.

By s. 267 of the Irish Bankruptcy Act, 1857 (20 & 21 Vict. c. 60): "When any person shall be adjudged a bankrupt, all the personal estate and effects of such bankrupt, ... and all debts due or to be due to him, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt; . . . and no such bankrupt, . . . nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof, ... but such assignees shall have absolute power and remedy to recover the same in their own names."

The defendants, insurance brokers in London, effected for one Guy, a shipowner in Dublin, insurances upon the hull and chartered freight of one of his ships. The ship was subsequently lost. After the loss of the ship Guy was adjudicated bankrupt, and the plaintiffs, who were the official assignees of the Irish Bankruptcy Court, became the assignees of his estate. After the adjudication Guy instructed the defendants to collect from the insurance office, and to forward to him, the insurance moneys due upon the policies, which was done

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by the defendants in due course. The defendants had no notice that Guy had been adjudicated bankrupt. In an action by the plaintiffs, as assignees of Guy's estate, to recover the moneys so paid over by the defendants to Guy:—

Held, that the title of the plaintiffs was complete upon the adjudication, and that they were entitled to recover.

ACTION tried before Cave, J., without a jury.

The facts, which were admitted, and the arguments, are fully set out in the judgment.

Channell, Q.C., and *J. V. Austin*, for the plaintiffs.

Bigham, Q.C., and *J. E. Hamilton*, for the defendants.

Cur. adv. vult.

Feb. 15. The following written judgment was delivered by

CAVE, J. This is an action to recover two sums of 489*l.* 4*s.* 6*d.* and 668*l.* 15*s.* 5*d.* under the following circumstances:—

The plaintiffs are the official assignees of the Court of Bankruptcy in Ireland. The defendants are insurance brokers carrying on business in London. On or about April 14, 1887, the defendants, acting under the instructions of John Read Guy, a shipowner carrying on business in Ireland, effected with the governor and company of the London Assurance a policy of insurance for 500*l.* on the chartered freight of Guy's ship *Mary Edey*. On or about April 20, 1887, Tyson & Co., acting under Guy's instructions, effected with the same company a policy of insurance for 700*l.* on the hull of the same ship. On May 18, 1887, the *Mary Edey* was lost, and the amounts insured became payable. On June 28, 1887, Guy was adjudicated bankrupt by the Court of Bankruptcy in Ireland. After the adjudication the defendants, acting on the instructions of Guy, collected the moneys payable under these two policies, and on October 6 remitted to Guy the sum of 489*l.* 4*s.* 6*d.* in respect of the policy on the freight, and on November 29 remitted him the sum of 668*l.* 15*s.* 5*d.* in respect of the policy on the ship. At the time of making these remittances the defendants had no notice that Guy had been adjudicated a bankrupt.

The plaintiffs alleged that the adjudication vested the right to receive the insurance moneys in them, that the receipt of the

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Cave, J.

moneys by the defendants was a receipt to their use, and that the payment to Guy was a wrongful application of the money so received.

For the defence it was contended—first, that the payments were protected transactions; secondly, that, the plaintiffs not having given notice of their title to the insurance company, the defendants were entitled to deal with Guy as the lawful owner; thirdly, that, the defendants' instructions being to collect and pay over the money, the plaintiffs could not at once approbate and reprobate this authority; and, fourthly, that the defendants had only dealt ministerially with the money at the request of the apparent owner, and were not liable to an action.

The first and second points may be dealt with together. Section 267 of the Irish Bankruptcy Act (20 & 21 Vict. c. 60) provides (inter alia) that, when any person shall be adjudged a bankrupt, all debts due or to be due to him shall become absolutely vested in the assignees for the time being, and no such bankrupt, nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof, but such assignees shall have absolute power and remedy to recover the same in their own names. In *In re Bright's Settlement* (1) it was held by the Court of Appeal that, under the same words in the English Act of 1849, the title of the assignee in bankruptcy, who had not given notice to the trustee of a reversionary share in a trust fund, must prevail over that of a subsequent assignee from the bankrupt for value without notice of the bankruptcy who had given immediate notice of his assignment to the trustee of the fund. Sect. 328 relates to protected transactions, but only protects payments made before the filing of the petition. The title, therefore, of the assignees was complete upon the adjudication; and the defendants cannot bring themselves within s. 328.

The third and fourth points may also be considered together. The first case to which it is necessary to refer is *Stephens* v. *Elwall* (2); for, although it is a case of an innocent agent dealing with a chattel, I think the same considerations must apply to dealing with choses in action. In that case the bankrupts being

(1) 13 Ch. D. 413.

(2) 4 M. & S. 259.

possessed of goods sold them after their bankruptcy to one Deane, to be paid for by bills on Heathcote, who had a house of trade in London, and for whom Deane bought the goods. Heathcote was in America; and the defendant was his clerk, and conducted the business of the house. Deane communicated to the defendant the fact of the purchase on the day it was made; and the goods were afterwards delivered to the defendant, who disposed of them by sending them to America to Heathcote. No demand was made on the defendant till nearly two years after the purchase; but the Court held him liable, Lord Ellenborough, C.J., saying: "The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but, nevertheless, his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it; and it is no answer that he acted under authority from another, who had himself no authority to dispose of it." The position of an innocent agent was much discussed in *Hollins* v. *Fowler* (1), where, however, the case was ultimately decided on another point. Possibly the true view may be that, where the act of the agent is obviously wrongful, if the principal is not the true owner or has not his authority, the agent is not protected, but, if he is an innocent agent, must look to his principal for indemnity; but that, on the other hand, when the act of an innocent agent is not obviously wrongful if the principal is not the owner and has not his authority, there the agent is excused.

There are some later cases which more or less resemble the case in question. Thus in *Ogden* v. *Benas* (2) a person falsely representing himself to be Vincent Willis took a cheque of the plaintiff payable to Vincent Willis or order to the defendants, and, having indorsed the name of Vincent Willis, requested the defendants to collect the amount and pay it to him. The defendants did so; and in an action by the plaintiff it was held that he was entitled to recover. For the defendants it was argued that, in causing the cheque to be presented to the drawer, the defendants were acting merely as agents of the person who, as bearer, appeared to be the person entitled to receive the money; although this view was not specially referred to in the judgments, the case was decided in

(1) Law Rep. 7 H. L. 757. (2) Law Rep. 9 C. P. 513.

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Cave, J.

favour of the plaintiff. In *Arnold* v. *Cheque Bank* (1) the plaintiffs, who were merchants at New York, desiring to transmit 1000*l.* to Williams & Co., of Bradford, purchased of Stewart & Co. in New York a draft for that amount drawn by Stewart & Co. on Smith, Payne, & Co., of London, payable to the order of the plaintiffs on demand. The plaintiffs indorsed the draft specially to Williams & Co. or order, and inclosed it in a letter addressed to them which was placed in a letter-box in their office to be posted in the usual way. The letter was stolen by one Hecht, a clerk in the employ of the plaintiffs, who forged an indorsement of Williams & Co., and procured the defendants, bankers in London, to present the draft and obtain the money, which was placed by them to the account of a person acting in concert with Hecht, upon whose cheques the money was almost immediately drawn out. In giving judgment in that case Lord Coleridge, C.J., held that there was a conversion by the defendants, on the ground that, after obtaining payment from Smith, Payne, & Smith, their next step in dealing with the money was not simply to hand it over to Mrs. Chandler, the person who was acting in concert with Hecht, but to retain it and open an account with her, the effect of which was to appropriate it to their own use as a loan from Mrs. Chandler. In *Fine Art Society* v. *Union Bank of London* (2) the plaintiffs banked with the defendants, and it was the duty of the plaintiffs' secretary to pay all moneys received by him on behalf of the plaintiffs into the defendants' bank to the credit of the plaintiffs. The secretary kept an account at the defendants' bank, and paid into the bank to his own credit certain post-office orders belonging to the plaintiffs, which the defendants subsequently cashed. The Master of the Rolls, in giving judgment, says: "The bank received the post-office orders innocently; but they received them not for the plaintiffs but for the clerk, who in so paying them in to his own account was acting without authority. It seems to me that such receipt was in itself strong evidence of a conversion. But, when the defendants took the post-office orders to the post-office, and handed them over in exchange for the money, I cannot doubt that there was a conversion." Fry, L.J., delivering the judgment of himself and Bowen, L.J., says that

(1) 1 C. P. D. 578.

(2) 17 Q. B. D. 705.

"the act of the bank in receiving the money from the post-office and treating the same as the money of Mugford was a wrongful application of the money by the bank. The point which thus arises arose for decision in the case of *Arnold* v. *Cheque Bank* (1); and we see no reason to differ from the conclusion arrived at in that case." Mr. Bigham sought to distinguish these cases on the ground that policies of assurance differ from cheques and post-office orders, because you cannot get the money without parting with the cheques and post-office orders, but can get it without parting with the policy. This hardly seems a satisfactory distinction; but, without pursuing that question further, it appears to me that in order to succeed Mr. Bigham must establish the proposition that a person, who in good faith assumes to dispose of property as the servant and under the authority and for the benefit of one apparently entitled to possession but not already in possession, is not liable to an action by the true owner. In the face of *Stephens* v. *Elwall* (2), and of the opinion of Lord Blackburn and Lord Chelmsford in *Hollins* v. *Fowler* (3) that that case is law, it is impossible for me so to hold. The doctrine as to the inconsistency of approbating and reprobating the same transaction does not apply to the circumstances of this case; and, therefore, there must be judgment for the plaintiffs for the amount claimed with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Crowders & Vizard.*
Solicitors for defendants: *Waltons, Bubb, & Johnson.*

(1) 1 C. P. D. 578. (2) 4 M. & S. 259.
(3) Law Rep. 7 H. L. 770, 796.

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[IN THE COURT OF APPEAL.]

THE CLERICAL, MEDICAL, AND GENERAL LIFE ASSURANCE SOCIETY *v.* CARTER.

Revenue—Income Tax—Profits or Gains—Interest arising from Investments made for Purposes of a Business—5 & 6 Vict. c. 35, ss. 52, 102—16 & 17 Vict. c. 34, ss. 1, 2, Sched. D.

The interest arising from investments made by a life insurance company for the purposes of their business, income tax on which had been deducted at its source, exceeded the amount of the profits of the company for the year of assessment. The company had also during the year received interest on investments from which there had been no deduction for income tax:—

Held, affirming the judgment of the Queen's Bench Division, that the company were liable to assessment to income tax in respect of such last-mentioned interest.

APPEAL from the judgment of the Queen's Bench Division (Manisty and Charles, JJ.) on a case stated by Income Tax Commissioners.

The facts are fully set out in the report of the case in the Court below (1), and for the purposes of this report may be stated briefly as follows:

The appellants, who are a life assurance society, had been assessed to income tax under Schedule D. of 16 & 17 Vict. c. 34, for the year 1885 in respect of interest arising from certain investments belonging to them, from which income-tax had not been deducted at its source and which had not been otherwise specifically charged. The appellants derived a large portion of their income from interest on investments. Such interest, including that which was the subject of the assessment in question, together with the society's other sources of income, was brought into the accounts of the society, which shewed that after debiting all expenses of management and other outgoings there was a certain balance of net profit for the year of assessment. The appellants had paid, by way of deduction at the source, income tax in respect of interest derived from their investments upon an amount which exceeded the amount of the above-mentioned balance of net profit.

(1) 21 Q. B. D. 339.

The contention for the appellants was, that under those circumstances they were not subject to any assessment in respect of the interest received by them as above mentioned from which income tax had not been deducted at its source. The commissioners, however, refused to discharge the assessment.

The Queen's Bench Division confirmed the decision of the commissioners.

Finlay, Q.C., and *A. T. Lawrence*, for the appellants. The subject of taxation under Schedule D. in this case is profits or gains arising from a business. Where, as in the case of life insurance, investments are part of the necessary machinery of the business, the interest on such investments is not to be looked at separately for the purpose of income tax. The profit in the business looked at as a whole is what has to be considered.

[BOWEN, L.J. The terms of the last clause of Schedule D. of the Income Tax Act, 1853, seem to make "interest of money" taxable as such.]

Those words may, very probably, have been introduced in the Act of 1853 to meet such a case as *Udney* v. *East India Co.* (1) Under the Act of 1842 only "profits or gains" came within Schedule D. It is contended that it was never intended by the last clause of Schedule D. in the Act of 1853 to extend the scope of the schedule to anything that is not "profits or gains." This interest is not to be regarded separately as a "profit or gain," because it is received in the course of a business, and the "profits or gains" of that business must be taken as a whole. The expression "interest of money" used in Schedule D. must be limited by the context, and must mean "interest on money being a profit or gain." The fact that by the provisions of the Acts interest on the investments of a business would be in many cases subject to deduction at the source is immaterial, because the provisions for deduction at the source are mere machinery of collection, and have nothing to do with liability. Sect. 102 of the 5 & 6 Vict. c. 35, is not a charging section in the sense that it extends the scope of Schedule D. of that Act; it merely provides for the deduction of the income tax at its source in cases within that

(1) 13 C. B. 733.

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[IN THE COURT OF APPEAL.]

THE CLERICAL, MEDICAL, AND GENERAL LIFE ASSURANCE SOCIETY *v.* CARTER.

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(1) 21 Q. B. D. 339.

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at the profits or gains of the business, and is not the subject of separate taxation.

LORD ESHER, M.R. In this case an assessment has been made on the appellants in respect of the interest on certain money. It is admitted that the interest in respect of which such assessment has been made is interest of such a nature as would be liable to assessment, unless the contention which has been made on the appellants' behalf is well founded. That contention is, in substance, that this interest is not an assessable subject-matter, because it comes to the appellants in the course of carrying on a business and only forms an item of their gross profits in such business, and, when the account of their net profits is taken, it may be that there would be no net profits at all. The question seems to me to be whether this interest is such interest as is spoken of in Schedule D. of 16 & 17 Vict. c. 34. If it is such interest as is mentioned in the last paragraph of that schedule, then the words of the Act shew plainly that the persons receiving it are assessable in respect of it. It is suggested, as I have said, that this interest is not interest within the meaning of the schedule, because it is an item to be taken into account in order to arrive at the annual profits and gains of the business. In the course of the argument there has been a long discussion of various puzzling matters in relation to the provisions of the Income Tax Acts, but after all we must construe the words of Schedule D. according to the ordinary canon of construction, that is to say, by giving them their ordinary meaning in the English language as applied to such a subject-matter, unless some gross and manifest absurdity would be thereby produced. There appears to be no such section in the Act of 1842 as s. 1 of the Act of 1853; but when we come to the Act of 1853 we find that s. 1 of that Act does mention "interest on money" as if it were a distinct and separate subject-matter of taxation. Having regard to that alteration in the Act of 1853 it seems to me that the contention, that Schedule D. cannot possibly have been intended to add any subject-matter of taxation to those mentioned in the former Act, falls to the ground. Then, when we come to Schedule D., we find the words "And for and in respect

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of all interest of money." Therefore that which appears to be mentioned in s. 1 as a separate subject-matter of taxation, is again mentioned in Schedule D. in similar terms. Having regard to the terms of s. 1 and the ordinary grammatical construction of the words of Schedule D., I cannot see my way to adding to the schedule any such words as have been suggested, or to reading the words as equivalent to "for and in respect of all profits and gains, if any, in a trade or business arising from any interest of money." That appears to me to be too large a paraphrase for us to make. I think we must read the words in their plain ordinary sense, and, if we do so, the result is that the interest in question is an assessable subject-matter. I think that this view of the Act is considerably fortified by the argument of the counsel for the Crown, based upon the provisions as to the deduction of income tax from interest. On looking at the provisions of the Act in this respect, it seems to me true to say that the intention is that, as far as possible, all interest shall be subject to such deduction, and I agree that that goes far to shew that all interest of money is intended to be taxable. I only use that argument as fortifying the conclusion at which I arrive upon the plain grammatical construction of the words of the schedule "for and in respect of all interest of money." The cardinal consideration on which I rely is the plain meaning of those words in the English language. On this view of the construction of the words it seems to me really immaterial to consider what may be the true construction of s. 52 of the Act of 1842. Assuming the plain meaning of the words to be what I have said, then, if hardship should arise as suggested, if the result should be, as was contended, that a sum of money such as this, which has been made a separate subject-matter of assessment as interest, may also be brought into account in arriving at the profits and gains of a business, and so taxed again, we cannot help such hardship. I do not mean to say that I think that contention to be correct. The Solicitor-General, on behalf of the Crown, strongly argued that that was not the effect of s. 52, and that the supposed hardship could not arise. So far as my opinion on the subject may avail, I must say that I accede to that view, and I think that the 52nd section ought to be so construed as to

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prevent the suggested hardship, and that interest of money ought not first to be taxed as a separate subject-matter of taxation, and then brought again into account in arriving at the profits and gains of a business and so taxed again. For these reasons I think the decision below was correct and should be affirmed.

FRY, L.J. I am of the same opinion. Schedule D. of the Act of 1853 creates a charge in respect of all "interest of money." The sum in question is "interest of money," and therefore, primâ facie, it is chargeable. How do the appellants meet that short line of argument in favour of the Crown? They endeavour to meet it by various considerations, but, as it appears to me, unsuccessfully. There was during the argument a suggestion that, the words "interest of money" in Schedule D., being followed by the words "annuities and other annual profits and gains," the interest to be chargeable must be annual interest, and that this was not such interest. But that point, not having been raised before the commissioners, is not now open; and I only advert to it to prevent its being supposed hereafter that the point was involved in our present decision. The conclusion at which I arrive upon the construction of the words "interest of money" in Schedule D. is fortified by the terms of s. 1, because that section stated the intention of the legislature to charge, amongst other things, "all interest of money," and seems therefore, to my mind, to give a very clear indication that the words "interest of money" in the schedule are to be read according to their ordinary signification in the English language. Again, a forcible argument was addressed to us by the counsel for the Crown, pointing out that all interest of money paid was intended to be a subject of deduction, and therefore that it was highly probable that the intention was that all interest received should be a subject of charge. In answer to these considerations, the appellants used various arguments. In the first place, they contended that the words upon which reliance was placed were for the first time introduced into the Act of 1853, not being found in the earlier statute of 1842, and that they were not sufficiently clear to create a new charge. If the point were material, I must say that my

present opinion is that interest of money was as much chargeable under the Act of 1842 as under the later Act. In the 102nd section and other sections of the earlier Act it appears to me to be clearly indicated as a subject-matter of taxation, and I think that the general words of Schedule D. in that Act were probably adequate to charge it. But the point does not seem to me to be really material for present consideration. I think that either interest of money was charged by the earlier Act, and the language of the later Act is altered to make that plainer which was not so plain before; or the later Act was intended to extend the scope of the taxation, and has effected the object by the plain words to which I have referred. It is said that there is injustice in charging interest on money as such in the case of a person or company whose business it is to deal in money; that, however legitimate such a charge may be in other cases, yet where the recipient of the interest deals in money, and makes, or tries to make, profits in his trade or business as such dealer, such interest ought not to be charged. I have some difficulty in following that argument. It seems to me comparatively immaterial what a man does with the money when he has received it; and I think that the words "profits or gains" are in many cases used by the Act of 1853 in reference to profits or gains of particular investments, and not necessarily to profits or gains of the trade of which those investments may be part. It was said for the Crown that the alleged injustice of a possible double taxation does not exist, because the 52nd section of the Act of 1842 removes it. Whether that section does or does not remove it in all cases, it seems to me to be reasonably plain that it removes it in all cases of payment of interest by the person who is himself chargeable with the duty. Whether the section would prevent the alleged injustice, if injustice there be, arising in a case where the payer of the interest was beyond the operation of the Act, the payee being within it, I think it is not necessary to consider. It is enough to say that in a very large number of cases the alleged injustice would be prevented by the operation of the section. I fall back on the view with which I started. The Act appears to me in plain words to create a charge on all interest of money, and the sum in question, being interest of money, cannot escape from the

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charge. For these reasons I agree that the appeal should be dismissed.

LORD ESHER, M.R., announced that BOWEN, L.J., concurred in the judgment.

Appeal dismissed.

Solicitor for appellants: *Montagu Turner.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

E. L.

Feb. 21.

[IN THE COURT OF APPEAL.]

LAMPLUGH *v.* NORTON AND OTHERS.

Poor-rate—Tithe Rent-charge—Distress on Owner of Rent-charge—6 & 7 *Wm.* 4, *c.* 71, *ss.* 69, 70—1 *Vict. c.* 69, *s.* 8.

Poor-rate assessed upon the owner of tithe rent-charge under 1 Vict. c. 69, s. 8, is not recoverable by distress warrant against such owner.

APPEAL from the judgment of Wills, J., at the trial before him without a jury.

The action was one of replevin, and the facts were as follows:—The plaintiff was the vicar of a parish in Kent, and had been assessed to the poor-rate in respect of his vicarial tithe commutation rent-charge. The rate not having been paid, the defendants, who were the overseers of the parish, took out a distress warrant against the plaintiff for the same, and the goods of the plaintiff in respect of which the action was brought were distrained under such warrant. (1) The learned judge held that there was no power to issue a distress warrant for poor-rate on tithe rent-charge against the owner of the tithe rent-charge, and therefore gave judgment for the plaintiff (2).

(1) It should perhaps be mentioned that the plaintiff's refusal to pay the rate had originally been in consequence of a point taken by him with regard to his liability, which turned on certain statutory provisions with regard to extraordinary tithe rent-charge, but it ultimately turned out at the trial that this point did not arise upon the facts of the case.

(2) 1 Vict. c. 69, s. 8, provides that "all rates and charges to which any rent-charge payable in lieu of tithes shall be liable may be assessed upon the owner of the rent-charge, and the whole or any part thereof may be recovered from any one or more of the occupiers of the lands out of which such rent-charge shall issue, in case the same shall not be sooner paid by

Channell, Q.C., and *Bargrave Deane*, for the defendants. The parson was rateable in respect of the tithes under the statute 43rd of Elizabeth, and, in the event of the rate not being paid, was subject in the ordinary way to a distress: *Rex* v. *Justices of Sussex.* (1) The tithe rent-charge was merely a substitute for the tithes in kind. By the 6 & 7 Wm. 4, c. 71, s. 69, the tithe rent-charge is made subject to poor-rate in like manner as the tithes had theretofore been, and the machinery given by s. 70 of that Act was that the assessment was to be on the occupier of the land out of which the rent-charge issued, and was to be recoverable in like manner as an ordinary poor-rate by distress warrant against such occupier. 1 Vict. c. 69, s. 8, gives another procedure. It provides that the assessment may be on the owner of the tithe rent-charge; and then proceeds to provide certain machinery by which it may be recovered from one or more of the occupiers of the land out of which the rent-charge issues. It is contended that the intention was to give alternative modes of recovery. The statutes generally applicable with regard to recovery of poor-rates from persons assessed, viz. 43 Eliz. c. 2, s. 4, and 17 Geo. 2, c. 38, s. 7, are applicable, and give a remedy by distress against the vicar as the person assessed. It is contended that the object of altering the provisions of the earlier Act, and permitting the assessment to be made on the owner of the tithe rent-charge, was to import the remedies given by the general law against a person assessed to the poor-rate.

Jeune, Q.C., and *H. Bertram Cox*, for the plaintiff. The provision that the owner of the rent-charge may be assessed does not import the ordinary procedure for recovery of poor-rates.

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the owner of the rent-charge upon whom the same shall be assessed, in like manner as any poor-rate assessed on such occupier or occupiers in respect of such lands may be recovered, upon giving to such occupier twenty-one days' notice in writing previous to any one of the half-yearly days of payment of the rent-charge, and the collector's receipt for the payment of such rates and charges, or of any part thereof, shall be received in satisfaction of so much of the rent-charge by the owner thereof; but no occupier shall be liable to pay at any one time in respect of such rates and charges any greater sum than the rent-charge payable in respect of the lands occupied by him in the same parish shall amount to for the current half-year in which such notice shall have been given."

(1) 3 N. & M. 263.

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Under the statute of Elizabeth and subsequent statutes as to ordinary poor-rates, there are three matters involved, viz. liability, assessment, and the machinery for enforcing the rate in case of non-payment. Assessment is only one step in the process. A person being liable, he is assessed, i.e., put in a list of such persons as are liable, and then, if he does not pay, a warrant of distress may be issued. But the foundation of the warrant there is the liability, not merely the assessment or being inserted in the list. Tithe rent-charge was not the subject of liability under those Acts. The statute 6 & 7 Wm. 4, c. 71, under which the tithe rent-charge comes into existence, provides that it shall be subject to rates and all other charges to which tithes were subject, and gives a particular machinery for the recovery of such rates or charges in the 70th section. It is contended that those provisions formed a complete code, within which the procedure in the case of all rates and charges on tithe rent-charge was to be found. The subject-matter is new, and those charges are being imposed upon it de novo. That being so, according to the well-known rules for the interpretation of Acts of Parliament, the mode of recovery given must be taken to be the only mode intended to exist: *Doe* v. *Bridges* (1); *Cates* v. *Knight* (2); *London, Brighton, and South Coast Ry. Co.* v. *Watson* (3) The machinery given by the 70th section of the Act of 1836 was found to cause difficulties, because the rate in respect of the tithe rent-charge had to be assessed on each occupation, and to be collected from each occupier, which was often a very inconvenient system in the case of a number of small occupations. For that reason s. 8 of 1 Vict. c. 69 provided that the assessment might be on the owner of the tithe rent-charge; and then a special machinery is given for recovery of the rate from one or more of the occupiers of the land. The defendants are in a dilemma; either this section does not create any liability in the owner, in which case it cannot import that the recovery is to be by distress on his goods; or, if it creates a liability, it is a new one, for under the Act of 1836 the owner was not liable: and then the ordinary rule of construction applies, that, where a statute imposes a

(1) 1 B. & Ad. 847, at p. 859. (2) 3 T. R. 442.
(3) 4 C. P. D. 118.

liability of this kind de novo, and gives a special mode of recovery, that is the only mode. In s. 70 of the Act of 1836 the words, "in case the same shall not be sooner paid by the owner," must mean "voluntarily paid," because under that Act the owner could not be assessed. The same words occur again in s. 8 of the later Act, and it is contended that they shew that it was not contemplated by the legislature that the rates or charges could be previously satisfied except by their voluntary payment by the owner.

Channell, Q.C., in reply.

LORD ESHER, M.R. In this case the plaintiff is the owner of a tithe rent-charge, in respect of which he has been assessed to the poor-rate. The rate not being paid, the overseers obtained a distress warrant and distrained upon the plaintiff's goods in order to levy the amount of the rate. The plaintiff contends that he was not liable to such distress: and the question we have to determine is whether his contention is correct. The subject-matter of the rate, upon which the distress warrant issued, being a tithe rent-charge, it is to be observed that under the statute of Elizabeth there could be no question of assessing any one in respect of a tithe rent-charge. No one could be assessed in respect of such a subject-matter until the passing of the 6 & 7 Wm. 4, c. 71. That Act provides for the creation of a rent-charge in lieu of tithes, and that such rent-charge shall be subject, amongst other matters, to all parochial rates in like manner as the tithes commuted were. It was suggested by the defendants' counsel that, inasmuch as the tithes were previously subject to be rated, and the rent-charge is in substitution for them, it could not be said that the Act created a new subject-matter of rating. I do not think that proposition can be maintained. The rent-charge is none the less a new subject-matter because it is in substitution for an old subject-matter which is abolished. The Act is therefore introducing a new subject-matter and providing that it shall be assessed to the poor-rate. It goes on in s. 70 to provide that all rates to which the rent-charge is liable shall be assessed upon the occupier of the lands out of which it issues. The owner of the rent-charge is not to

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be assessed under that legislation. The section then provides for recovery of the rates "in case the same shall not be sooner paid by the owner of the rent-charge for the time being." It seems to me that under that Act the owner is not under any direct liability to pay the rate. It does not appear to me that he can be sued for the amount of the rate; and there is no provision for the issuing of a distress warrant against him. He is not assessed, and the Act under which distress warrants are granted in the case of ordinary poor-rates cannot be applied. If so, the words must mean simply "in case the same shall not have been in fact paid by the owner of the rent-charge." In that case the section provides that the rate may be recovered from the occupier of the land like an ordinary poor-rate, viz., by obtaining a distress warrant against him and levying the amount upon his goods under such warrant. Therefore the effect of the provision is that a new subject-matter, viz., the tithe rent-charge, is made subject to the rate, which is to be assessed on the occupier, and that, if the owner of the rent-charge does not in fact pay, then the only mode of recovery provided is by distress warrant against the occupier of the land. It is apparent that such a provision for recovery of the rate is a peculiar form of legislation. The distress is to be upon a person in respect of a rate upon something in which he has no interest and from which he gets no benefit. Having regard to the terms of such an enactment alone, and without reference to any general canon of construction, I should come to the conclusion that the effect of such a provision with regard to a new subject-matter is that the remedy so given is meant to be the only remedy. But I agree with what was said by Lord Tenterden in *Doe* v. *Bridges*. (1) He there said, "Where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that the performance cannot be enforced in any other manner." He appears to me to have stated that as being a general rule, not as one which is absolutely rigid, and may not admit of special exceptions: and, notwithstanding criticism that has been applied to what he said, I think it is a good working rule for getting at the meaning of the legislature in the cases to which it applies, and that it is applicable

(1) 1 B. & Ad. 847, at p. 859.

to the legislation we have to construe in this case. That legislation creates a new subject-matter of assessment, and a particular mode of recovery is provided; and, if any further reason be necessary to shew that that is to be the only mode of recovery, it seems to me that it is to be found in the peculiarity of the mode of recovery given.

We then come to the statute 1 Vict. c. 69, s. 8. I am very much disposed to think that the provision there made was intended to be in substitution for that contained in s. 70 of the previous Act, and that the word "may" in the section must therefore be read as equivalent to "shall:" but it is not necessary to decide whether that is so, for, assuming that the section provides additional machinery, leaving the former provision standing, then it no doubt enlarges the code of law with regard to rates and other charges on tithe rent-charge that existed in the former Act: but still I think the two provisions must be read together as parts of one and the same code. The 8th section provides that the rates may be assessed on the owner of the rent-charge, and that the whole or any part thereof may be recovered from any one or more of the occupiers of the lands out of which the rent-charge issues, in case the same shall not be sooner paid by the owner of the rent-charge, in like manner as a poor-rate assessed on such occupier or occupiers in respect of such lands may be recovered. The section creates therefore a new obligation to this extent, viz., that it enables an assessment to be made on the owner of the rent-charge; but, though the owner may be assessed, here again the section does not give any right to sue him for the rate or provide any other process against him: a mode of recovery is given, viz., by distress, not against the owner, but against the occupier or occupiers of the land. Whether this machinery is intended to be an addition to or in substitution for the machinery given by the 70th section of the former Act, the same rule applies. A new obligation is created, and a remedy is given in the same section. It seems to me that under these circumstances the same rule of construction applies, and the section must be treated as a code containing all the law with regard to the recovery in respect of the new obligation, and that there can be no other mode of recovery than that specified. For

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these reasons it seems to me that the decision of the learned judge was correct, and that this appeal should be dismissed.

BOWEN, L.J. This case is not altogether without difficulty. The question is whether, a new obligation being created by the Act of 1837, the procedure for recovery given by that Act, viz., that against the occupier of the land, is the only procedure. To understand the Act it is necessary to bear certain things in mind. Tithes were rateable under the statute of Elizabeth, and it had become well-settled law that the parson was to be treated for the purpose of rating under that statute as the occupier of the tithes. Then came the Tithe Commutation Act of 1836, which substituted the statutory rent-charge for the old tithes. This Act contains certain provisions, the object of which is to bring the new rent-charge within the operation of the taxation provided for by the old law. The question is in what way the legislature has intended the procedure for this purpose to be worked out. As I have said, under the old law the parson was treated as the occupier of the tithes. The new law, taking it as a whole, treats him as owner of the tithe rent-charge. It does not use the term "occupier" in reference to the tithe rent-charge but in reference to the occupier of the land out of which it issues.

By the 69th section of 6 & 7 Wm. 4, c. 71, it is provided that every rent-charge payable as aforesaid instead of tithes shall be subject to all parliamentary, parochial, and county and other rates, charges, and assessments in like manner as the tithes commuted for such rent-charge have heretofore been subject. Therefore it is not only poor-rate to which the new tithe rent-charge is made liable, but it is also made subject to all parliamentary and other charges to which the tithes were liable. Then comes s. 70. The question that arises is whether, on the true construction of that section, it does not make provisions, which, in connection with s. 69, are intended to be the code on the subject; providing for liability in the first place, then for assessment, and, in the last place, providing a complete procedure, within the four corners of which the mode of enforcing the liability is to be found. It seems to me that, on the true construction of the section, it is

intended to be such a code. A new liability being imposed on every rent-charge payable under the Act, the language of s. 70 appears to me unintelligible unless it be regarded as forming the code of procedure on the subject. The rent-charge is the rent-charge of the parson; but the Act does not provide for a rate to be recovered from the owner. The provisions of s. 70 are quite inconsistent with that notion. The rate is not to be recovered from the owner of the rent-charge, as being a person in the position of an occupier of tithes, but it is to be recovered in the first instance from the occupiers of the land out of which the rent-charge issues. So a charge is created on the property of one man, and the only procedure given is against another man. It seems to me to follow from the very nature of this procedure, that the section must be looked on as forming the code of procedure on the subject, and that no other means of recovery can be intended to exist than the specific means given by the section. I arrive at this conclusion on consideration of the history of the legislation on the subject, the nature of the subject-matter, and the mode in which the legislation is framed. The Master of the Rolls has relied on a general canon of construction with regard to Acts of Parliament. I must say for myself that I have always thought it difficult to lay down beforehand canons of construction by reference to which the objects of future statutes are to be defined. It has always seemed to me that it is safer to abstain from imposing with regard to Acts of Parliament any further canons of construction than those applicable to all documents. It is sufficient, however, for the purposes of this case to say that, without reference to any general canon of construction, I arrive at the conclusion that the true construction of the statute is what I have mentioned.

Passing on to s. 8 of 1 Vict. c. 69, I think that the true answer was given on behalf of the plaintiff to the argument that there was no real reason for introducing the power to assess the owner of the rent-charge, unless the construction contended for by the defendants were correct. The object appears to have been to provide a fresh machinery differing from that previously provided, by which the rate on the rent-charge was assessed in the form of a rate on each occupier of the lands out of which

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the rent-charge issued, and so to enable the amount of the rate on the tithe rent-charge to be collected in a more expeditious and convenient manner. This view explains the introduction of the provision that the rates may be assessed on the owner of the rent-charge, and shews that the introduction of those words was not intended to import all the law that existed with regard to the recovery of assessments to poor-rate under the older statutes. It seems to me that s. 8 is merely a section of the code contained in the Tithe Commutation Acts with regard to the taxation and rating of tithe rent-charge, and the collection of the charges thereon.

Whether the machinery given by s. 8 is additional to or in substitution for the machinery given by the earlier Act, it appears to me immaterial for the purposes of this case to determine. For these reasons I agree that the judgment below was correct.

FRY, L.J. I am of the same opinion. Whether I approach the enactments on the subject by the light of the working rule of construction to which the Master of the Rolls has referred, or merely look to the language of the statutes themselves, I come to the same conclusion as to their meaning, which is, shortly stated, that, having created a new subject-matter, viz., the tithe rent-charge, and having imposed thereon a liability to taxation, they then provide a machinery for the recovery of the charges so imposed; and that under these circumstances the machinery so provided must be considered as being in the place of the machinery that exists in the case of poor-rates under the ordinary law. The earlier statute of 1836 declares in s. 69 that the rent-charge created under the Act shall be subject to all parliamentary, parochial, and county, and other rates, charges, and assessments, in like manner as the tithes commuted had theretofore been subject; then comes s. 70, which deals with two things, viz., the assessment of the charges on the rent-charge, and the recovery of them. The rate or other charge is to be assessed not on the owner of the rent-charge but on the occupiers of the land out of which it issues, and then the section goes on to provide the mode of recovery, which is to be the same as that existing in the case of an ordinary poor-rate on occupiers of land. Pausing there,

it seems to me that there is in the clause itself sufficient indication of an intention to create a code within which is to be found the sole mode of recovery of the rates and charges imposed by the Act upon the tithe rent-charge. The subject-matter, the tithe rent-charge, is new; and all the charges and rates, whether parliamentary, or parochial, or otherwise, to which the rent-charge is to be subject, are gathered into the scope of one provision, and the same remedy is given in respect of them all, which is the same as that which existed previously in the case of occupiers assessed to the poor-rate. Another suggestive circumstance is this: the clause enacts that the poor-rates may be recovered by distress upon the occupier. It would have been unnecessary to provide that with regard to the poor-rate, unless it were intended that this enactment should be in substitution for any modes of recovery existing under previous statutes. Looking at the clause as a whole, I cannot help thinking that the intention was to create a single system of recovery applicable to all the rates and charges imposed on the new subject-matter to come into existence under the Act. That such must have been the intention seems to become still plainer when we approach the later Act. The 8th section provides for the assessment of the owner of the rent-charge, and whether that mode of procedure is intended to be additional to or in substitution for that given in the earlier statute it is not necessary now to decide. The provision is followed by one enabling the whole or any part of the rate or other charge to be recovered from any one or more of the occupiers of the lands subject to the rent-charge to an extent not exceeding the rent-charge upon the occupier's land for the current half-year; and the contingency on which such mode of recovery depends is that the rate or other charge "shall not be sooner paid by the owner of the rent-charge upon whom the same shall be assessed." To my mind those words contemplate payment in the proper legal sense of the term. Now if the defendants' counsel are right in saying that, by the earlier statutes, or the earlier part of the same section, a remedy by distress is given against the owner of the rent-charge, then there ought to have been words providing not only for payment by the owner, but for his having previously suffered distress. In the absence of such

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words, if the defendants' counsel are right, the section strictly interpreted would import that after the rate had been levied by distress on the owner there might still be a distress on the occupier of the land. Of course such a conclusion would be monstrous; the language used, therefore, seems to me strong to shew that the legislature, in stating the contingency on which there might be a recovery by distress upon the occupier, was conscious that the only mode in which the rate or other charge could be previously satisfied was by voluntary payment by the owner, and that no distress could be levied upon him. All these considerations produce in my mind the very plain conclusion that, reading the two statutes together, they form a code of the law as to the recovery of the rates or other charges upon this particular subject-matter, and that it is not intended that any other mode of recovery shall be implied under the word "assessed" in the earlier portion of the 8th section of the later Act. Another observation that occurs to me is this. The argument for the defendants was based on the word "assessed" in the first part of the 8th section. It was argued that as soon as there is an assessment it follows that there may be a power of distress against the person assessed. To maintain that proposition reference was made to the statutes 43 Eliz. c. 2, and 17 Geo. 2, c. 38. In my opinion these enactments do not amount to a declaration that, wherever a person is assessed and has not paid, there may be a distress warrant against him. The statute of Elizabeth only contemplated the assessment of those who under it were liable to contribute to the maintenance of the poor, and gave a power to issue distress against those persons who, being so liable to contribute, refused to do so. It was essential to the application of the Act that there should be a person liable to contribute under that Act whose liability had been ascertained by assessment, and who refused to contribute. The statute of George II. merely enlarges the remedy by warrant of distress given by the earlier Act, and uses words descriptive of the area within which the levy under such warrant might be made. I do not think that there is to be found in either Act any general legislative declaration that, wherever any person assessed to a poor-rate does not pay it, it may be recovered by warrant of

distress against his goods. For these reasons I agree that the appeal should be dismissed. 1889

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Appeal dismissed.

Solicitors for plaintiff: *White, Borrett, & Co.*

Solicitors for defendants: *Palmer & Bull, for Scudamore & Brennan.*

E. L.

THE QUEEN *v.* LAMBOURN VALLEY RAILWAY COMPANY. 1888 *Nov. 20.*

Mandamus—Prerogative Writ—Railway Company—Transfer of Shares—Refusal to register—Remedy by Action.

A shareholder in a railway company made a real and absolute transfer of his shares for a nominal consideration to an insolvent person in order to avoid liability for future calls. The company refused to register the transfer. A rule nisi for a prerogative writ of mandamus to compel the company to register the transfer having been granted:—

Held, that inasmuch as the prosecutor had another specific and sufficient remedy, viz., by action of mandamus, the prerogative writ ought not to issue, and the rule must be discharged.

RULE calling on the Lambourn Valley Railway Company to shew cause why a writ of mandamus should not issue directed to them commanding them forthwith to register a transfer of 495 shares of 10*l.* each in the said company from Henry Hippisley to Walter Aubrey White.

It appeared from affidavits that the prosecutor became a director and holder of shares in the defendant company, which was incorporated by the Lambourn Valley Railway Act, 1883. The period within which the railway was to be made was fixed by the Act at five years. The railway was not made, and a proposal by the company to apply to Parliament for a bill to extend the time for the construction of the line was opposed by the prosecutor. The bill was, however, presented and passed, and a contract was entered into for the construction of the line, whereupon the prosecutor, desiring to withdraw from the company and under legal advice, executed an absolute transfer of his shares, for a nominal consideration, to one White, a stockbroker's clerk, practically insolvent. The transfers were tendered to the secre-

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tary of the company for registration, but he refused to register them.

It was conceded by the prosecutor that the transfer was made to avoid liability, but he maintained that the transfer was bonâ fide and without any reservation of right or interest, and he and the transferee offered themselves in court for cross-examination on their affidavits, but the defendant company declined to cross-examine them.

Finlay, Q.C., and *McCall*, shewed cause. The prosecutor has no right to transfer his shares to a pauper. The Court will not compel the registration of a transfer made merely to avoid liability. The transfer is not real, it is only for a nominal consideration, and if the company prospered and the shares became valuable the prosecutor would, no doubt, insist on a re-transfer.

[He referred to *De Pass's Case* (1); *Hyam's Case* (2); *Costello's Case* (3); *King's Case.* (4)]

Secondly, the prerogative writ of mandamus is discretionary, and the Court should refuse it in such a case as the present one: *Reg.* v. *Liverpool, Manchester, and Newcastle-upon-Tyne Railway Co.* (5)

The transfer is not completed and may be impeached: See per Lord Westbury: *In re European Assurance, Lloyd's Case* (6), cited in Chadwyck Healey on Company Law, 2nd ed. p. 77. The transfer is not complete until registration. Again, the prosecutor has another specific remedy by action of mandamus.

Bosanquet, Q.C., and *àBeckett Terrell*, in support of the rule. The prosecutor desired to withdraw from the railway not to escape any past liability, but to avoid future liabilities which the company might incur against his will. He was entitled to do so by transfering his shares, even to a pauper. The cases cited on the subject are considered and the result of them is stated in Lindley on Partnership, 4th ed. at pp. 701, 1403, to be that "where no restriction on the right to transfer exists a transfer to a pauper in order to escape from liability is valid and cannot be

(1) 4 De G. & J. 544.
(2) 1 De G. F. & J. 75.
(3) 2 De G. F. & J. 302.
(4) Law Rep. 6 Ch. 196, at p. 203.
(5) 21 L. J. (Q B.) 284.
(6) Reilly's Eur. Arb. R. 44.

prevented." It cannot be contended that the transfer was not absolute and real. He has a statutory right to have the transfer registered. By the Companies Clauses Act, 1845 (8 Vict. c. 16), s. 15, a duty is imposed on the secretary of the company to register the transfer. The direct and only mode of enforcing that duty is by mandamus: *Norris* v. *Irish Land Co.* (1); *Reg.* v. *Shropshire Union Co.* (2)

Cur. adv. vult.

1888. Nov. 20. POLLOCK, B. This was an application on behalf of Mr. Hippisley for a prerogative writ of mandamus to issue to the defendants, requiring them to register the transfer of 495 shares in their company which had been transferred by him to one White, who was clerk to a stockbroker.

The motion was resisted upon the grounds: first, that the transfer of the shares in question was not a real transaction; and secondly, that the transferee was a person in insolvent circumstances. Lastly, it was contended that the granting of a writ of mandamus being discretionary, the Court ought not to grant the present application, there being other remedies open to him.

Our decision upon the last contention renders it unnecessary to state our opinion as to the first two questions; but I think it is right to say that as the matter now rests upon the affidavits, I have come to the conclusion that the transfer was real in the sense that it was intended to effect an out-and-out assignment to the transferee, and that there was no covert agreement or understanding to the contrary; but I think it equally clear that the transferee was a man who was practically insolvent, and that he would be quite unable to pay any calls which might hereafter be made in respect of the said shares.

Under these circumstances the transfer is one which ought to be upheld by the Court.

Counsel cited *Hyam's Case* (3), *Costello's Case* (4), *De Pass's Case* (5), and *King's Case* (6); and although the individual

(1) 8 E. & B. 512.
(2) Law Rep. 8 Q. B. 420.
(3) 1 De G. F. & J. 75.
(4) 2 De G. F. & J. 302.
(5) 4 De G. & J. 544.
(6) Law Rep. 6 Ch. 196.

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opinion expressed by some of the learned judges varies, these authorities in substance support the proposition that if the transfer be real, it will be upheld, although it be made to a mere pauper, and for the avowed purpose of relieving the transferor from any future liability.

It is only fair to the applicant in the present case to add that he was not a promoter of the company, nor did he seek to avoid liability for expenses already incurred; but he transferred the shares in question because he was opposed to an application being made to parliament for the enlargement of the time already allowed for the making of the line.

With respect to the last objection which has been made to the granting of a mandamus, a question of some practical importance arises, and it was for the consideration of this that we took time to consider what our judgment should be.

There is no doubt that the granting of a prerogative writ of mandamus is discretionary, and the rule by which we ought to be governed is well established. In Blackstone's Commentaries, vol. iii., p. 110, it is stated that a mandamus is "a high prerogative writ, of a most . . . remedial nature," and "issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance." In *Rex* v. *Bank of England* (1) Lord Mansfield said: "When there is no specific remedy the Court will grant a mandamus that justice may be done." These words were amplified by Lord Esher, M.R., in the recent case of *In re Nathan* (2), where he said that they meant, "Where there is no specific remedy, and by reason of the want of that specific remedy justice cannot be done unless a mandamus is to go, then a mandamus will go."

Until the year 1854 no specific remedy existed whereby the registry of a transfer of shares in a public company could be enforced; and it being considered that the proper registration of such transfers was a duty of a public, or quasi-public character this Court from time to time has directed that a peremptory writ of mandamus shall issue to enforce its discharge.

In 1849, when Lord Denman presided in this court, a rule for such a mandamus was granted in the case of *Reg.* v. *Londonderry*

(1) 2 Doug. 524, at p. 526. (2) 12 Q. B. D. at p. 473.

and Coleraine Ry. Co. (1), and again in 1856, when Lord Campbell was Chief Justice, a similar rule was granted in *Reg.* v. *General Cemetery Co.* (2); but in both these cases the rule was discharged on the merits, and the point now under discussion does not appear to have been taken or alluded to by the Court. It will be observed that the last of these cases occurred after the passing of the Common Law Procedure Act, 1854, but, as I have already said, the objection was in no way raised or discussed.

The Common Law Procedure Act, 1854, by s. 68 enables a plaintiff to claim in any action a writ of mandamus "commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested." This provision was repealed by 46 & 47 Vict. c. 49, s. 4, sched. But in substance it is re-enacted by the Judicature Act, 1873, s. 25, subs. 8, and Order LIII.

This does not take away from the Court a jurisdiction which it has long possessed, but the effect of it ought to be taken into consideration when the discretion of the Court comes to be exercised. Since the passing of this Act it cannot be said that the plaintiff has no specific remedy to enforce the right which he says has been denied to him in the present case. Moreover, it is to be observed that at the present time when the number of registered public companies which exist for the purpose of commerce and otherwise has been increased more than a hundredfold, the duty of properly keeping the register of shareholders belonging to each company can scarcely be considered to be as much a duty of a public, or quasi-public character as it was in years gone by when such companies were less numerous.

But the question is not without authority: in *Reg.* v. *Lords Commissioners of the Treasury* (3) Lord Campbell, C.J., said: "The right, if it exists, is a legal right; and there is no efficient remedy without the aid of this prerogative writ;" and in *In re Barlow* (4) Hill, J., said: "It is well settled that where there is a remedy equally convenient, beneficial, and effectual, a mandamus will not be granted." These dicta were referred to by

(1) 13 Q. B. 998.
(2) 6 E. & B. 415.
(3) 16 Q. B. 357, at p. 361.
(4) 30 L. J. (Q.B.) 271.

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Field, J., in *Reg.* v. *Registrar of Joint Stock Companies* (1), who added: "We have therefore to see whether or not there is a remedy equally beneficial with this remedy of mandamus. My own opinion is, that this prerogative writ is a most inconvenient remedy, though less so than formerly. There is at first a rule that it do issue, and then a return would have to be made to it; and the question to be settled could not be decided without much delay." In this case the Court held that the remedy of a writ of mandamus will not be granted where there is another remedy, equally convenient and effectual, open to the applicant at the time when it becomes necessary to resort to one or other of such remedies, and I entirely agree in the remarks made by Field, J.

In the case of *In re Nathan* (2), to which I have already referred, this Court having granted a mandamus to the Commissioners of Inland Revenue to pay to the applicant certain duty which he alleged he had overpaid, the Court of Appeal reversed the decision upon the ground that the proper remedy was by petition of right. The principle by which the Court should be governed in these cases was fully discussed by Lord Esher, M.R., and by Bowen, L.J., and the latter in giving judgment, at p. 478, said: "A writ of mandamus, as everybody knows, is a high prerogative writ, invented for the purpose of supplying defects of justice. By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done. The proceeding, however, by mandamus, is most cumbrous and most expensive; and from time immemorial accordingly the Courts have never granted a writ of mandamus where there was another more convenient or feasible remedy within the reach of the subject."

In the course of the argument we were referred to the case of *Reg.* v. *Shropshire Union Company.* (3) In this case, which occurred in 1873, the Court of Exchequer Chamber, overruling the Court of Queen's Bench, ordered that a mandamus should go to the defendant company upon an application similar to the present one, the point, however, with which we are now dealing

(1) 21 Q. B. D. 131, at p. 135; 57 L. J. (Q.B.) 433, at p. 437.

(2) 12 Q. B. D. 461.

(3) Law Rep. 8 Q. B. 420.

was not taken, and it seems probable from the report of the case that the parties were anxious to raise the question at issue by special case, and so agreed to the mandamus.

For these reasons I think that the order nisi for a mandamus, should be discharged, and with costs.

MANISTY, J. After the exhaustive judgment pronounced by my learned Brother, I might content myself with stating simply that I concur in the result. I am, however, anxious that it should be understood that I found my judgment—not on the merits or demerits of the case, but—on the sole point that this is a case in which the prerogative writ of mandamus ought not to go. Numerous authorities establish the proposition that the Queen's Bench Division, which alone has power to grant the writ, ought not to grant it if the applicant has another and sufficient remedy by action.

For more than a century the authorities have been uniform on the subject. In *Rex* v. *Bishop of Chester* (1) it was laid down as an invariable rule; see also Blackstone's Commentaries, 7th ed., p. 631, note (*k*); *Reg.* v. *Powell* (2), and the judgments of Brett, M.R., and Bowen, L.J. in *In re Nathan* (3), in which it was held that a petition of right was a sufficient remedy.

In 1854, a remedy which did not exist before was given by the legislature, viz. an action of mandamus, which is in fact for a decree ordering the performance of the duty which the Court thinks ought to be done, and is a more convenient proceeding than by the prerogative writ. On that ground only, and without entering into the question whether the secretary of the company was bound to register the transfer—for that is the question to be tried—I am of opinion that this rule should be discharged with costs.

Rule discharged with costs.

Solicitor for prosecutor: *Heggerty.*

Solicitors for defendants: *Le Brasseur & Oakley.*

(1) 1 T. R. 396. (2) 1 Q. B. 352

(3) 12 Q. B. D. 461.

J. R.

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Jan. 18.

In re THE SHEFFIELD AND SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY IN LIQUIDATION.

Building Society—Subscription Shares—Withdrawal—Winding-up—Liability of Withdrawn Members—37 & 38 Vict. c. 42, s. 14—25 & 26 Vict. c. 89, s. 200.

By the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 14, the liability of any member of any society under the Act in respect of any shares upon which no advance has been made shall be limited to the amount actually paid or in arrear on such share.

By s. 16 the rules of every such society shall set forth "(4) the terms upon which shares may be withdrawn."

By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 200, "in the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable at law or in equity to pay or contribute to the payment of any debt or liability of the company."

Members of a building society incorporated under the Building Societies Act, 1874, who had investing shares payable by monthly subscriptions, and upon which no advance had been made, gave due notice of withdrawal and received the estimated amount of their shares under the rules of the society before the shares were fully paid up or matured. The society was, within a year afterwards, wound up in the county court, under the winding-up clauses of the Companies Acts, and the judge, on the application of creditors, made an order declaring that holders of such shares not matured at the commencement of the winding-up were, notwithstanding withdrawal, liable to contribute to the assets of the society to the extent to which their shares were "in arrear" at the commencement of the winding-up, and that the extent to which such shares should be deemed to be in arrear was the extent of the total amount of subscriptions which became payable prior to the winding-up, together with fines and interest:—

Held, that the order was wrong, for that, on withdrawal of their shares, the holders ceased to be members of the society, and no amount was "in arrear" within s. 14 of the Building Societies Act, 1874, and that they were not liable "at law or in equity" to contribute to its debts within the meaning of s. 200 of the Companies Act, 1862.

Appeal from Sheffield County Court.

The Sheffield and South Yorkshire Permanent Building Society was incorporated under 37 & 38 Vict. c. 42 (the Building Societies Act, 1874). Its rules, made in pursuance of the Act, provided that the shares of the society should be of two classes, investing shares, and advanced shares; that there should be two kinds of investing shares, viz., subscription shares, and paid-up shares; that the monthly subscriptions payable upon the

investing shares, to mature at certain prescribed periods of years varying from five to ten years, should be certain prescribed sums, and as to "withdrawals," by rule 42 "any investing member, on giving ten days' notice in writing previous to the first Monday in any month, may withdraw the whole or any part of the amount due to him. The amount payable on ordinary shares shall be according to a scale at the end of these rules. Rule 43. The amount payable on paid-up shares shall be the amount paid in by the investor with compound interest thereon at such rate not exceeding five per cent., calculated yearly as the board may from time to time determine;" "Rule 44. The directors shall have power to limit the amount that shall be withdrawn in any month, and, in case of such limitation, withdrawals shall be paid in rotation according to priority of notice." At the end of the rules was a "Schedule of Forms" including a "Table shewing the amount payable per 100*l.* upon withdrawn shares for 5, 6, 7, 8, 9 and 10 years' terms, providing all subscriptions and fines are duly paid," and after setting out the respective amounts, it was provided that if a member should "withdraw his share" in the course of a year the sum set down at the close of the last year should be payable with interest thereon at 5 per cent., together with any monthly subscriptions subsequently paid.

The appellants were unadvanced investing members of the society, but gave due notice and withdrew before their shares attained maturity. Within a year afterwards, proceedings for winding-up the society, under the winding-up clauses of the Companies Act, 1862, were taken in the county court, and liquidators were appointed. Upon an application made on behalf of the depositors in and creditors of the society, the county court judge made an order declaring, inter alia, that all persons holding subscription investing shares in the society not fully paid up or matured at the date of the commencement of the winding-up were liable to contribute to the assets of the society to the extent to which such shares were at such date in arrear, and to be settled in the list of contributories of the society accordingly, notwithstanding that such persons might, prior to the commencement of the winding-up, have given notice under the rules of the society to withdraw the whole or any part of the amounts due to them

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in respect of such shares, and had actually withdrawn such amounts. And that the extent to which such subscription investing shares not fully paid up or matured should be deemed to be in arrear was the extent of the total amount of the subscriptions which, under or by virtue of rule 37, and having regard to the term of years for which the shares were taken, became payable in respect of such shares prior to the commencement of the winding-up of the society (without regard to any notice given under rule 42), together with the fines and interest (if any) payable in respect of such shares, less the amounts, if any, of the subscriptions paid in respect of such shares. And it was ordered that all persons so holding such subscription investing shares should be forthwith settled on the list of contributories of the society to the extent of their liability as therein before declared.

1889. Jan. 17. *Buckley, Q.C.*, and *Upjohn*, for the appellants. So much of the order of the county court judge as declared that the appellants were liable as contributories was wrong. The Building Societies Act, 1874 (37 & 38 Vict. c. 42), by s. 14 limits the liability of any member in respect of any share upon which no advance has been made to the amount actually paid or "in arrear" on such share. The appellants had ceased to be members, and no amount was "in arrear" on their shares within the meaning of that section. They had duly withdrawn before the commencement of the winding-up, and had no further right to any profits or bonus. Sect. 16 enacts that the rules of every society shall set forth, inter alia, "(4) The terms on which shares may be withdrawn" and the rules headed "Withdrawal" set forth those terms accordingly. It is true that in rule 42 the expression used is that a member may withdraw the "amount" due to him, but it is evident from the Schedule of Forms specifying the amount payable upon "withdrawn shares" and the proviso in case a member "withdraw his shares," that the "withdrawal of shares" is intended. No suggestion that the withdrawal was otherwise than bonâ fide has been made. The observations of Lord Selborne in *Brownlie* v. *Russell* (1) which were referred to by the county court judge do not support his judgment.

(1) 8 App. Cas. 235, at p. 247.

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Grosvenor Woods, for the respondents. The appellants are liable to the creditors of the society. Even before the Building Societies Act of 1874 there was a borrowing power in such a society, and the members were liable for loans, and under the ordinary law a member was in the position of a partner, who could not get rid of liability by withdrawing his capital. The distinction between the liability to creditors and the liability of the members inter se was recognised by Sir W. Page Wood, V.C., *In re Doncaster Permanent Building Society* (1) and *In re Professional Commercial and Industrial Benefit Building Society* (2), such a society seems to have been treated as one of unlimited liability to external creditors. Then as to the Act of 1874, rule 60 specifies the amount of monthly repayments, and rule 61 expressly declares that, "The borrowing members, in consideration of the above payments, shall not be responsible for expenses of management, nor for any losses which the society may incur," and therefore implies that the investing members will be liable. No doubt it may be said that withdrawing members would not be entitled to a share of profits, but they would if their shares matured.

The winding-up provisions of the Companies Acts, 1862, and 1867, are applicable to societies registered under the Building Societies Act, 1874: *Andrew* v. *Swansea Cambrian Benefit Building Society* (3); and by Part VII. of the Companies Act, 1862, s. 199, any partnership or association of more than seven members and not registered under this Act, and thereinafter included in the term "unregistered company," may be wound up under this Act, and all the provisions of this Act with respect to winding-up shall apply to such company, with certain exceptions not material in the present case. This society consists of more than seven members. By s. 200, in the event of an unregistered company being wound up every person shall be deemed to be a contributory who is liable at law or in equity to pay or contribute to the payment of any debt of the company or to the payment of any sum for the adjustment of the rights of the members amongst themselves.

(1) Law Rep. 3 Eq. 158, at p. 170; Law Rep. 4 Eq. 579, at pp. 586–7.
(2) Law Rep. 6 Ch. 856.
(3) 50 L. J. (Q.B.) 428.

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Atkinson, Q.C., and *Barker*, for the liquidators, did not argue.

Upjohn, in reply. The question as to withdrawing members did not arise in the cases cited. The society is not a partnership but is a body corporate, and the individual members are not "liable at law or in equity" for its debts, and therefore s. 200 of the Companies Act, 1862, is inapplicable. The creditors must have recourse to the assets of the corporation. Sect. 14 of the Buildings Societies Act, 1874, does not apply, because the appellants have withdrawn and ceased to be members; but, even assuming that it applied, they would only be liable to the amount of subscriptions "in arrear," and none were in arrear. It would be absurd to suppose that a member who had duly paid up his subscriptions should be liable to pay the amount again while a member in default would only have to contribute the amount in arrear.

Cur. adv. vult.

CAVE, J. This is an appeal from the decision of the county court judge, who was asked to make an order with respect to the liability of certain persons who had at one time been members of the Sheffield and South Yorkshire Permanent Building Society. There is reason to suppose that the assets of the society will not pay the debts; and, consequently, there is a desire to make every one who can pay liable for the debts of the society. It is a building society formed under the Building Societies Act, 1874, and by that Act is incorporated, with a perpetual succession and common seal and all the incidents of a corporation. By the internal arrangements of the society there are investing members and advanced members. An investing member subscribes for a loan of, say, 100*l.*, on the terms of paying the amount of subscriptions in five or more years up to ten; and his subscriptions are so adjusted that at the end of a specified time he will have paid a sum which, with compound interest, will make up 100*l.*, or, if he likes, he may pay money down at once so that at the end of the time he will, in the shape of the sum paid down and compound interest, have paid 100*l.* Then there are "advanced members," who have the amount of their shares lent to them, and who give a mortgage on their property for the advances, and pay off the advances by subscriptions, so that at the end of a certain time

they have repaid the advances, and the mortgaged property becomes free from the mortgage. In addition to that, there is power given to members, if they think fit to do so, to withdraw their shares on giving a certain notice to the society. That notice is self-operating, so that at the expiration of the notice, if all subscriptions and fines are duly paid, the shares are withdrawn; and, looking at the rules and the Act itself, it cannot be doubted that a member thereupon ceases to be a member of the society, and has no longer to make any payments. He receives back the payments he has made with compound interest, and forfeits any claim to profits of the society, which are divided amongst those who remain members until their shares attain maturity.

Some members having withdrawn, it was sought to render them liable to make good the expected deficiency in the assets of the society by reason of bad investments or investments on insufficient securities. It was necessary to make a call. The county court judge decided, with respect to persons withdrawn, that those who had withdrawn after the whole of their payments had been made, were no longer subject to any liability, but that those who had withdrawn—as they might do—before their shares arrived at maturity—that is, in the first or any subsequent year before the amount which they had to pay was fully paid—were liable, and liable for the amount unpaid on their shares. The county court judge came to that conclusion on s. 14 of the Act of 1874. He, in fact, held that the withdrawn member was a member of the society, and that all the payments which he had not in fact made were arrears on his shares, and, consequently, that, to the extent of those arrears, he was liable to contribute, if necessary, to the debts of the society. That position was not taken up here by Mr. Grosvenor Woods, who admitted that he was unable to support it. I am entirely of that opinion. So far as I can put a construction on this Act, which is tolerably clear, it seems to me to follow that a member who has withdrawn his shares ceases thereupon to be a member of the society at all, and that it is quite immaterial what are the exact expressions used in the rules; for it is clear from the table at the end, as well as from the rules themselves, that the intention is that he shall withdraw his "shares"—i.e., receive back the sum paid, with the interest—and

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that afterwards he shall have nothing to do with the society—he has no more payments to make to the society, and has no interest whatever in any profits to be made, and no power to attend any meeting or take any part in its affairs. Further, it is impossible, in my judgment, to say that the sum unpaid can be called "in arrear." Suppose a man who is to pay 90*l.* by instalments in five years, so calculated that he pays 18*l.* instalments, which at 5 per cent. interest will amount at the end of the fifth year to 100*l.* Suppose at the end of the first year he chooses to withdraw, he will have paid 18*l.*, and he gets that back and ceases to be a member of the society, and has no more payments to make and no more right to any share of the profits. How can it be said that the four subsequent payments of 18*l.*, which he would have had to pay if he had remained in the society, are "in arrear?" They are not "in arrear." They have never accrued due. If he had remained a member, and had not paid them, he would have been "in arrear," and be liable to pay a fine. But, under the circumstances of the case, he is not liable at all. That disposes of the case so far as the county court judge decided it. But Mr. Grosvenor Woods took a different point, with which it is necessary for us to deal. He argued that persons who unite together for trading or making profits in any way are, at common law, liable for all debts which are incurred during the time they are members of the association, and that, if the association has ultimately to be wound up, past members must pay their shares of the debts. As a general rule—apart from legislation—that is perfectly true with respect to partners, and with respect to associations in the nature of partnership where there is no incorporation, but with respect to corporations the case is entirely different where the legislature has not thought fit to intervene, or where the charter under which the body is incorporated does not provide otherwise. A corporation is a legal *persona* just as much as an individual; and, if a man trusts a corporation, he trusts that legal *persona*, and must look to its assets for payment: he can only call upon individual members to contribute in case the Act or charter has so provided. Sect. 38 of the Companies Act, 1862, has so provided; but, inasmuch as that section is confined to companies registered under that Act, it does not

apply here; and the learned counsel for the creditors, therefore, has recourse to s. 200 as to the winding-up of a company not registered under the Act. Sect. 200, however, does not create any liability, but only relates to the mode of enforcing liability where it exists. There may be many associations wound up under that part of the Companies Act in which, either by virtue of the charter of incorporation or by statute, there is liability on past members; and, when such liability exists, it will have to be dealt with under s. 200. I agree that there are other associations where no such liability exists, and where s. 200 does not come into question. This is a case of a building society under the Building Societies Act of 1874, s. 9 of which provides that such society shall become a body corporate; and the result follows that the creditors must look to the corporate assets, and to them only, for payment of the debts of the society, unless they can shew that some statute has imposed a liability on individuals in addition to the liability which is established as against the effects of the corporate body. Nothing of that sort is to be found. The only thing to be found on that point is s. 14, which (as I have said) is confined to the liability of members, and does not extend to the liability of past members. That is not only the object of the section, but the words themselves point in the same direction: "The liability of any member of any society under this Act in respect of any share upon which no advance has been made shall be limited to the amount actually paid or in arrear on such share." First, leave out the words "or in arrear." Suppose one man had been a member for a year, and had paid 18*l.*, and another had been a member for two years and had paid 36*l.*, the liability of each would be limited to the amount actually paid, viz. 18*l.* or 36*l.* respectively, and, if more were demanded, it would be something *in addition* to what was paid. But there are the words "amount in arrear," which do, I think, enable the liquidators to call on existing shareholders to pay up their subscriptions; and these, when paid, are to be devoted to the discharge of the liabilities of the society. But I see nothing there which can apply to a man who has *ceased* to be a member, and who consequently has not and cannot have any arrears, because his payments have come to an end. He

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is altogether out of it. That section seems to me to be confined entirely to persons who actually remain members of the society, and not to extend to persons who have ceased to be members. As an illustration of the injustice of putting any other construction on the section, I would point out that, if a past member who has withdrawn his share is to be liable at all, there is no limit of time with respect to his liability. It was contended that he was to be liable to the full extent to which it might be necessary to call on him to meet the liabilities of the society—limited, of course, in this way, viz., that he would only be called on to meet the liabilities which had become liabilities at the time when he was still a member of the society. But, even if so limited, a man might have an enormous sum to pay; and is it reasonable to suppose that the legislature would limit the liability of an actual member (who has an interest in the society and a share in the profits accruing) to the amount already paid or which he has to pay until maturity of his share, and yet in the case of a man who has withdrawn his share, and has no further control over the society's dealings and no right to any part of the profits, should make him responsible, without any limit at all except a limit which is not a pecuniary limit, but is dependent on the length of time he has been out of the society.

For these reasons I come to the conclusion that past or withdrawn members are not liable at all to supplement the assets of the society, that they are not liable under s. 14, and that there is no other statute making them liable; and, consequently, by the common law applicable to an incorporate body, the creditor who cannot point out any Act creating liability has no right to resort to them, and must content himself with looking to the actual assets of the society, supplemented by contributions of members "in arrear" under s. 14. I think that the order of the county court judge should be modified by striking out so much of it as declares that these withdrawn members are liable to any extent to contribute to the assets of the society.

CHARLES, J. I am of the same opinion. The main question is, what is the effect of the withdrawal of a member from this Sheffield and South Yorkshire Permanent Building Society?

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The society was incorporated under s. 9 of the Act of 1874. The Act provides by s. 16 that the rules shall set forth, inter alia, (4) "The terms upon which shares may be withdrawn." This society accordingly had rules on that subject. Those rules, which are headed "Withdrawals," are: Rule 42. "Any investing member on giving ten days' notice in writing previous to the first Monday in any month, may withdraw the whole or any part of the amount due to him. The amount payable on ordinary shares shall be according to a scale at the end of these rules." Rule 43. "The amount payable on paid-up shares shall be the amount paid in by the investor with compound interest thereon, at such rate not exceeding 5 per cent. calculated yearly as the board may from time to time determine." Rule 44. "The directors shall have power to limit the amount that shall be withdrawn in any one month: and in case of such limitation, withdrawals shall be paid in rotation according to priority of notice." At the end of the rules is the scale to which reference is made, and it prescribes the amount of money which each withdrawn member would be entitled to receive, according to the number of years of the period of his connection with the society. The county court judge came to the conclusion that although the appellants did actually give the notice prescribed by rule 42, yet, nevertheless, they remained members of the society in the sense that at the commencement of the winding-up they were liable to contribute to the assets of the society. He seems to have come to that conclusion having regard to the language of the rule itself, which undoubtedly does not *in terms* enable the member to withdraw his "share," but only the "amount due to him." That rule, however, was made in pursuance of the Act giving power to make rules as to "the terms upon which shares may be withdrawn." But that rule 42 refers to withdrawal of shares is made perfectly clear by the table containing the schedule of forms to which the learned county court judge made no reference. That shews the amount payable upon "withdrawn shares," and there is also a proviso applicable to a member who may "withdraw his share," shewing plainly that the rules and forms do give the terms on which "shares" are to be withdrawn. What, then, is the position of the person who has withdrawn his share? I think that he ceases to be a member of the

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society. These holders of withdrawn shares therefore have ceased to be members, and were no longer members of the society at the commencement of the winding-up. That being so, s. 14 of the Act of 1874, which refers only to the liability of *members* of the society, does not apply at all. They have ceased to be members of the society, and the liability of any member "shall be limited to the amount actually paid or in arrear on such share:" s. 14. That appears to me to have no application to the withdrawn members.

But it is said, nevertheless, that there is a liability on them, and it was argued that this is an unregistered company within s. 200 of the Companies Act, 1862, and withdrawn members are liable as contributories under that section. The learned counsel for the respondents says that the withdrawn members were "liable at law or in equity" to contribute so far as the debts or liabilities were incurred while they were members. But that contention assumes that the individual members of a corporation are liable for the debts of the corporation, an assumption which I have no doubt is a wrong one, unless the charter creating the society or some Act of Parliament has created that liability. Sect. 200 cannot be relied on in this case, because the society is a corporate body, and—apart from statute—the individuals composing it are not liable to the debts or liabilities of the body corporate; so the argument on s. 200 fails. It would indeed be strange if it were otherwise, for the result would follow that whereas the liabilities of persons remaining members would be limited to the amount of their shares, or of the shares unpaid, the liability of past members would only be limited by the amount of the debts which accrued during the time they were members. I have nothing to add to what my learned Brother has said on the construction of s. 14 of the Building Societies Act, 1874.

Order varied accordingly.

Solicitor for appellants: *Bell, Brodrick, & Gray, for F. Parker Rhodes, Rotherham.*

Solicitors for respondents: *Swift & Ashington.*

Solicitors for liquidators: *Harvey & Capron for Webster & Styring.*

J. R.

THE QUEEN *v.* SCOTT AND OTHERS, JUSTICES. 1889

Jan 22.

Inn—Licence—Off Spirit Licence—Discretion of Justices—Grounds of Refusal—Wine and Beerhouse Act, 1869 (32 & 33 *Vict. c.* 27), *s.* 8—*Beer Dealers Retail Licences Act*, 1880 (43 *Vict. c.* 6), *s.* 1.

Section 8 of the Wine and Beerhouse Act, 1869, which enacts that certificates for off retail licences under that Act are only to be refused upon one of the four grounds therein specified, is repealed by s. 1 of the Beer Dealers Retail Licences Act, 1880, only so far as it relates to beer licences; and the discretion of licensing justices as to the granting of certificates for off retail wine or spirit licences is still subject to the limitations imposed by s. 8 of the Wine and Beerhouse Act, 1869.

RULE for a mandamus to the licensing justices of South Shields calling on them to shew cause why they should not hear and determine an application for an off spirit licence under the Licensing Act, 1872.

It appeared that one John George Bell, a grocer, applied at the general annual licensing meeting for a licence for the sale of spirits by retail not to be consumed on the premises, and that no objection was made to the grant of the licence on the ground of the applicant's character. The licensing justices having announced their intention to grant no new licences whatever, it was contended by the applicant that their discretion to refuse it was limited to the four grounds set out in s. 8 of the Wine and Beerhouse Act, 1869; but the justices, being of opinion that their discretion was unlimited, refused the application on the ground that there was no need for such a licence in the locality named in the notice of application.

By 23 Vict. c. 27, s. 3: "Every person who shall keep a shop for the sale of any goods or commodities other than foreign wine, ... shall, without producing or having any other licence or authority, be entitled to take out a licence under this Act to sell by retail . . . . in such shop foreign wine not to be consumed on the premises where sold. . . . ."

By the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), the certificate of justices was made necessary to the granting of a licence, and by s. 8 it was enacted that ". . . . no application

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for a certificate under this Act in respect of a licence to sell by retail beer, cider, or wine not to be consumed on the premises shall be refused, except upon one or more of the following grounds:" [it is unnecessary to set out the grounds in this report.]

By s. 69 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), "a licence for the sale of liqueurs or spirits by retail not to be consumed on the premises may, where such licence is required by this Act, be granted in the same manner in all respects in which a licence for selling wine not to be consumed on the premises may by law be granted, and an application for such a licence shall not be refused except upon one or more of the grounds on which a certificate in respect of a licence to sell by retail beer, cider, or wine not to be consumed on the premises may be refused."

The preamble of the Beer Dealers Retail Licences Act, 1880 (43 Vict. c. 6), is as follows: "Whereas by the enactments described in the schedule to this Act provision is now made for the holder of a strong beer dealer's wholesale excise licence obtaining, on a certificate granted by justices, an additional licence for sale of beer by retail for consumption off the premises, and it is expedient that justices should be at liberty to exercise their discretion respecting the grant of such certificates, as they are in respect of their licences for sale of beer to be consumed on the premises. . . . ."

By s. 1 of that Act, "Section eight of the Wine and Beerhouse Act, 1869, is hereby repealed, as far as the qualification therein contained relates to grant of certificates for such additional licences as aforesaid; and the licensing justices shall be at liberty either to refuse such certificates as aforesaid on any grounds appearing to them in the exercise of their discretion sufficient, or to grant the same to such persons as they, in the execution of their statutory powers, and in the exercise of their discretion, deem fit and proper."

The justices shewed cause by an affidavit setting forth the facts, and stating that in their opinion the 1st section of the Act of 1880 had repealed s. 8 of the Wine and Beerhouse Act, 1869, and had also impliedly repealed s. 69 of the Licensing Act, 1872,

and that there was therefore no statutory restriction on their discretion to grant or refuse the application.

J. Paterson, for the prosecutor. The effect of s. 69 of the Licensing Act, 1872, was to place off spirit licences on exactly the same footing as off-wine licences, and by s. 8 of the Act of 1869, beerhouse and wine licences were to be refused only on one or more of the grounds specified in that section, none of which are applicable to the present case. The Act of 1880 applies to beer licences only and not to licences for the sale of wine or spirits, and repeals s. 8 of the Act of 1869 only so far as it relates to the grant of beer licences; this is clear upon a comparison of the 1st section of the Act with the preamble. The 1st section deals with "such additional licences as aforesaid," and these words are explained by the preamble, which speaks of "an additional licence for the sale of beer by retail for consumption off the premises." The grant of wine licences, and therefore of spirit licences, is not affected by this section, and as regards them the discretion of the justices is still subject to the limitations imposed by s. 8 of the Act of 1869.

HUDDLESTON, B. The justices claim to have an absolute discretion to refuse this licence, and say that in their opinion s. 1 of the Act of 1880 repeals the provisions of the Act of 1869, so that their discretion is no longer fettered by the four qualifications imposed by the earlier Act. But upon reading the section it is quite clear that it does not operate as a repeal of the whole of the qualifications on the justices' discretion, but only operates to repeal them so far as they relate to the grants of "such additional licences as aforesaid." The preamble explains the meaning of those words, and it is abundantly clear that the additional licences affected by s. 1 are those referred to in the preamble. So far the Act of 1869 is repealed, as the context shews, for the licensing justices are to be at liberty to refuse "such certificates as aforesaid" on any grounds appearing to them in the exercise of their discretion sufficient. All that is repealed of that Act is so much as refers to the grant of additional licences for the sale of beer by retail for consumption off the premises; as

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to that the justices have an absolute discretion; but their discretion as to the refusal of off wine and spirit licences is still subject to the restrictions imposed by the Act of 1869.

WILLS, J. I am of the same opinion.

Rule absolute.

Solicitors for prosecutor: *Rowcliffes, Rawle & Co., for Newlands & Newlands, Newcastle-on-Tyne.*

W. J. B.

Jan. 31.

[IN THE COURT OF APPEAL.]

BRAY, SURVEYOR OF TAXES *v.* THE JUSTICES OF LANCASHIRE.

Revenue—Income Tax—County Asylum—Duty on Income from Land—The Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 60, 61, *No.* 6, *Sched. A.—The Income Tax Act*, 1853 (16 & 17 *Vict. c.* 45), *s.* 2, *Sched. A.—The Lunatic Asylums Act*, 1853 (16 & 17 *Vict. c.* 97).

The justices of a county were assessed to the income tax under Schedule A. of the Income Tax Act, 1842, in respect of such parts of a county lunatic asylum established under the Lunatic Asylums Act, 1853, as were occupied by officers having an income of more than one hundred and fifty pounds per annum. On a case stated:—

Held, affirming the judgment of the Queen's Bench Division, that the premises assessed were not in the occupation of the Crown or of persons using them exclusively in and for the service of the Crown, and were therefore not exempt from assessment to the income tax.

The only question argued before the commissioners and raised by the case stated by them, having been whether the premises could be assessed, the Court of Appeal declined to decide who were the proper parties to be assessed.

CASE stated by Commissioners of Income Tax.

The Whittingham Asylum is a county lunatic asylum established under the Lunatic Asylums Act, 1853, for the reception of pauper lunatics. The committee of visitors appointed a medical superintendent, medical officers, a steward, and chaplain, who were each respectively charged to the income tax in amounts exceeding 150*l.* per annum. The apartments occupied by the chaplain were separate from the asylum buildings but were within the grounds, those of the other officers were in the asylum.

The clerk of the peace appeared for the justices before the

commissioners, and contended that neither the county justices nor the committee of visitors were liable to pay income tax under Schedule A. in respect to the apartments so occupied on the following grounds :—(1.) The medical superintendent is bound by Act of Parliament to be resident in the asylum, and the medical officers and steward are also bound to reside within the building by order of the committee of visitors; (2.) The medical superintendent, the steward, and medical officers may be transferred by order of the justices, or in the case of the medical officers and steward by order of the medical superintendent at a moment's notice from one set of rooms to another; (3.) The medical officers have not exclusive occupation of their apartments, the medical superintendent, the steward, and housekeeper each having a master key thereto; (4.) There is no such occupation either by the committee of visitors, or the justices, or by the medical officers as contemplated by the Act 5 & 6 Vict. c. 35, s. 63, No. 9, r. 2; (5.) The chaplain is bound to reside in the house which has been built expressly for the purpose of a chaplain's house; (6.) The furniture in the case of the medical officers and steward is supplied wholly, and in the case of the medical superintendent and chaplain chiefly, by the justices. The medical officers and steward are also boarded at the expense of the county rates; (7.) The justices are bound by the 16 & 17 Vict. c. 97, to provide an asylum for pauper lunatics, and the building is erected out of the county rates, and there is no beneficial occupation on the part of the officers, they being servants of the justices or of the committee of visitors, and their occupation being compulsory; (8.) The medical superintendent and the other officers are not removable by order of the justices to any other asylum within the county, but are liable to be discharged at three months' notice.

The surveyor contended that the county justices were the occupiers of the whole asylum within the meaning of the Income Tax Acts, although a permissive right of enjoyment had been given for the time being to the several officers.

The commissioners discharged the assessment.

On the application of the surveyor a case was stated.

When the case came on in the Queen's Bench Division for

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hearing an order was made for an adjournment and that in the meantime the special case should be referred to the junior counsel to see how far they were agreed upon facts alleged but not specifically found by the case, and that the questions for the opinion of the Court should be added. Accordingly, certain admissions were agreed to, and questions stated which raised the point whether if the asylum was properly assessable to income tax the justices of the county for the time being were chargeable, and if not so chargeable whether the committee of visitors for the time being or the officers residing in the asylum or the clerk of the peace or the inhabitants or ratepayers of the county or any other person or body of persons were chargeable with such income tax.

Sir Edward Clarke, S.G., and *A. V. Dicey*, for the Crown.
Gainsford Bruce, Q.C., and *Smyly*, for the justices.

Cur. adv. vult.

1888. April 24. The judgment of the Court (Pollock, B., and Hawkins, J.) was read by

POLLOCK, B. This is an appeal from the decision of the Income Tax Commissioners for the Amounderness division of the county of Lancaster made on October 15, 1887, whereby they discharged an assessment of income tax made on the justices of Lancashire for the year ending April 5, 1888, in respect of certain parts of the Whittingham County Lunatic Asylum used as apartments for the medical superintendent, medical officers, and steward, and in respect of a separate house occupied by the chaplain.

The assessment appealed against was under Schedule A. and in the following form, "Justices of the County of Lancaster," "Whittingham Asylum," "confined to such portions of the public buildings, offices, and premises belonging to the asylum as are occupied by officers whose incomes amount to or exceed 150*l.* per annum."

The facts material to our decision are as follows:—

The Whittingham Asylum is a county lunatic asylum established under the 16 & 17 Vict. c. 97. The committee of visitors

of the asylum (appointed by the justices under ss. 2 and 21 of that Act) duly appointed the medical superintendent, medical officers, steward, and chaplain, under s. 55 of the last-mentioned Act. The medical superintendent, medical officers, steward, and chaplain are each respectively charged to the income tax under Schedule E. in amounts exceeding 150*l.* per annum. The apartments occupied by the medical superintendent, medical officers, and stewards, are situated in and form part of the asylum buildings. The chaplain occupies a house separate from the asylum buildings, but situated within the asylum grounds. The medical superintendent is bound by s. 55 of the above Act to be resident in the asylum. The medical officers and steward are bound to reside within the building by order of the committee of visitors. The medical superintendent, the steward, and medical officers, may be transferred by order of the justices, or in the case of the medical officers and steward by order of the medical superintendent, at a moment's notice, from one set of rooms to another. The medical officers have not exclusive occupation of their apartments—the medical superintendent, the steward and housekeeper each having a master key thereto. The chaplain is bound to reside in the house which has been built expressly for the purposes of a chaplain's house.

The furniture in the case of the medical officers and steward is supplied wholly, and in the case of the medical superintendent and chaplain chiefly, by the justices. The medical officers and steward are also boarded at the expense of the county rates. The medical superintendent and chaplain are not so boarded. The justices are bound by the 16 & 17 Vict. c. 97, to provide an asylum for pauper lunatics, and the building is erected out of the county rates, and there is no beneficial occupation on the part of the officers, they being servants of the justices or of the committee of visitors, and their occupation being compulsory. The medical superintendent and other officers were not removeable by order of the justices to any other asylum within the county, but were liable to be discharged at three months' notice.

The liability to assessment under Schedule A. arises as follows:—By the Income Tax Act, 1853 (16 & 17 Vict. c. 34), the duties are granted "for and in respect of the property in all lands,

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tenements, hereditaments, and heritages in the United Kingdom, and to be charged for every twenty shillings of the annual value thereof." The duties granted by the Act are by s. 5 to be assessed and collected under the regulations and provisions of the Income Tax Act, 1842 (5 & 6 Vict. c. 35). By Schedule A., r. 1, of the latter Act, the annual value of lands or tenements charged under Schedule A is to be understood to be, if the same are not let at rack rent, at the rack rent "at which the same are worth to be let by the year; which rule shall be construed to extend to all lands, tenements and hereditaments, or heritages capable of actual occupation, of whatever nature and for whatever purpose occupied or enjoyed, and of whatever value."

By rule 2 of No. IX., "Every person having the use of any lands or tenements shall be taken and considered for the purposes of this Act as the occupier of such lands or tenements;" and by sect. 70 the several duties are to be assessed "on all lands, tenements, and hereditaments, whether occupied at the time of assessment or not." Unless, therefore, the apartments in question are exempted by common law or by the provisions of some statute it seems clear that they are subject to income tax under Schedule A, as coming within the words, "all lands, tenements," &c.

The only exemption by statute which has any apparent reference to the present case is that contained in 5 & 6 Vict. c. 35, s. 61. No. 6 which provides that allowance is to be made under Schedule A "For the duties charged on any hospital, public school, or almshouses, in respect of the public buildings, offices, and premises belonging to such hospital, public school, or almshouse, and not occupied by any individual officer or the master thereof whose whole income, however arising, estimated according to the rules and directions of this Act, shall amount to or exceed 150*l.* per annum, or by any person paying rent for the same."

It seems only necessary to read this section to see that the apartments occupied by the medical superintendent, medical officers and steward, and the house occupied by the chaplain, each of whose income exceeds 150*l.* per annum, come within the scope of the Income Tax Acts, and not within the allowance provided for.

A more serious question arises when we come to consider the objection made by the respondents upon the ground that the apartments are in the nature of Crown property, and are solely used for Crown purposes.

The principle upon which this exception depends is thoroughly established, and may be said to rest upon the well-known rule of law that the Crown, by virtue of its prerogative, is not bound by any statute unless it be expressly named. This is explained by Lord Kenyon in *Rex* v. *Cook* (1), where it was held that the post horse duty imposed by 25 Geo. 3, c. 51, was not payable in respect of horses employed in forwarding public expresses in the service of the Crown. Since that decision there have been many instances in which public buildings used for Government purposes only have been held to be exempt from poor-rates. Thus the Horse Guards, *Lord Amhurst* v. *Lord Somers* (2); the Post Office, *Smith* v. *Birmingham* (3); the Admiralty, *Reg.* v. *Stewart* (4), have all been held to be exempt from poor-rates upon this ground. In some of the cases which followed these the Court appears to have gone further and allowed the exemption in favour of premises occupied by improvement commissioners and others who used them for public purposes other than Crown or Government purposes; but in the *Tyne Improvement Commissioners* v. *Chirton* (5) these cases were all brought to the attention of the Court, and Lord Campbell, in giving judgment, distinctly rests the right of exemption upon the ground that "the purposes for which the property is occupied are purposes created by the Government of the country:" and in the *Mersey Docks and Harbour Board* v. *Cameron* (6) the House of Lords gave effect to and confirmed this distinction. Blackburn, J., in delivering the opinion of the judges, states that the exemption depends entirely on the occupier and not on the title to the property, and after reviewing the authorities he says that in the cases in which the exemption has been allowed the purposes of the occupation "are public purposes of that kind which, by the constitution of this country, fall within the province of Govern-

(1) 3 T. R. 519.
(2) 2 T. R. 372.
(3) 7 E. & B. 483.
(4) 8 E. & B. 360.
(5) 1 E. & E. 516.
(6) 11 H. L. C. 443.

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ment and are committed to the Sovereign, so that the occupiers, though not perhaps strictly servants of the Sovereign, might be considered *in consimili casu*;" and Lord Westbury (p. 505) says that the public purposes to make good an exemption "must be such as are required and created by the Government of the country, and are therefore to be deemed part of the use and service of the Crown."

In *Coomber* v. *Justices of Berkshire* (1) the Divisional Court, the Court of Appeal, and the House of Lords, all held that the question whether premises are liable to be rated for the relief of the poor, and whether they are liable to be taxed for income tax, is for the above purposes identical. They also agreed that in order to establish an exemption in either case the premises in question must be such that they can be properly treated as being occupied by the Crown or for Crown purposes, or for public purposes of such a kind as to fall within the province of Government.

The only remaining point for consideration upon this part of the case is, what is the character and purpose of the lunatic asylum in which are the apartments which are assessed to income tax. It is a county lunatic asylum, built and conducted under the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97).

The effect of that statute is that the justices of every county are required and empowered to maintain a lunatic asylum, with a proper staff of officers, for the maintenance and care of pauper lunatics within their county. This is, no doubt, a matter of public interest, and it may be essential for the public welfare; but, as a matter of duty and necessity, the justices in carrying out the requirements of the Act cannot be said to be discharging the functions which belong to the Crown or the Government of the county at large, any more than when they are doing many other things, either in obedience to a statute or otherwise, which are requisite for the well-being of their county.

Another point was raised by the respondent which we do not think need be dealt with at any great length. It was said that the Crown has by its prerogative the custody of lunatics, and that the requirements of the County Lunatic Asylums Act were

(1) 9 Q. B. D. 17; 10 Q. B. D. 267; 9 App. Cas. 61.

but an assignment to the justices of the different counties of that prerogative, and therefore that the asylum and all its appointments were exempted from income tax.

There is no doubt as to the existence of the prerogative of the Crown with respect to the custody of lunatics. It has been doubted and discussed whether its origin was of common law or by statute, but that the right exists is beyond all doubt. The nature of it is stated in Bacon's Abridgment, tit. Idiots and Lunatics (C): "It seems to be agreed at this day that the king, as parens patriæ, hath the protection of all his subjects, and that in a more peculiar manner he is to take care of all those who, by reason of their imbecility and want of understanding, are incapable of taking care of themselves. This in some books is called a prerogative in the Crown, and in others a regium munus, or duty which the King owes his subjects in return for their subjection and allegiance to him." For which he cites Stanf. Prerog., 2nd Inst., and other authorities.

In modern times this prerogative has been exercised by the Court of Chancery when dealing with the property of lunatics, and more directly by the Commissioners of Lunacy acting under statutes which have been passed from time to time, and also by the judges and others holding Criminal Courts when carrying out the statutory provisions relating to criminal lunatics, but there is no trace in our law books or elsewhere of the Crown having taken upon itself the general custody and maintenance of persons of unsound mind. Until the passing of the modern Acts relating to lunatic asylums, pauper and other lunatics were habitually maintained in private houses, hospitals, and poor houses; and even now the relations of a lunatic or others who do so without profit may keep and maintain a lunatic in a private house without any licence to do so. If the contention of the respondents were to be given effect to, it would seem to follow that a father or mother could not maintain in their cottage an imbecile child without exercising the prerogative of the Crown, and partially acquiring for their home the privilege of a royal residence.

The fallacy of this argument consists in confounding two distinct matters: one the prerogative, privilege, and duty of the Crown to protect and, if necessary, to control lunatics; the other,

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the duty which belongs to parents, parishes, and counties to maintain them if paupers. In respect of this latter obligation, the duty is identical whether the pauper who is maintained be a lunatic or a person of sound mind, and therefore it cannot correctly be said that the magistrates, when providing for the custody and maintenance of pauper lunatics in the county lunatic asylum are exercising a prerogative of the Crown, or discharging a duty which appertains to the public government of the county.

The last objection urged by the respondents is one of a more technical character, but it not the less requires to be answered before judgment can be given for the appellant. It is this, that even if it be admitted that the apartments in question are properly assessed to income tax, "the justices of the county of Lancaster" are not such a body as can be assessed. They are not strictly a corporation, but this does not seem to us to assist the respondents' argument much, for if they are a body known to the law and to the legislature, it would seem to follow that where apartments in respect of which income tax is payable are occupied by them, that is by their officers and servants, the justices are the persons who as a body ought to be assessed. If it were not so this curious consequence would follow, that there would be apartments in respect of which income tax is payable, a body of persons occupying them, and beneficially occupying them (since if these apartments did not exist, the justices would be compelled to obtain others), and yet no person or body of persons would be assessable—a conclusion so inconvenient and impossible that one would be slow to adopt it.

But it was further said, How is the claim of the Crown to be enforced? Can the magistrates be made liable personally or collectively? No practical difficulty seems to present itself as to this, for the Crown can always enforce payment of income tax due and unpaid by distress upon the premises by virtue of its prerogative, and also under the provisions of the Taxes Management Act, 1880, s. 86, and in this particular case provision is made by the Income Tax Act, 1842, s. 70, that, "so far as respects the duties chargeable under Schedule A., in case any lands charged to the said duties shall be unoccupied, and no distress can be found on the same at the time such duties shall

be payable, it shall be lawful for the collector of the parish or place where the said lands are situate for the time being, at any time after, to enter upon the said lands when there shall be any distress thereupon to be found, and the distress to seize and sell, under the like powers as he might have distrained on the same lands if in the occupation of such person at the time the duties became due."

Is there, then, any sufficient ground or reason in law why the magistrates as a body should not be assessed? Their functions in reference to the county lunatic asylum are created and regulated by the provisions of the statute already referred to (16 & 17 Vict. c. 97), and it will be seen on reference to this statute that, although the justices are empowered by s. 3 to appoint a committee to superintend the erection of the county lunatic asylum, and by s. 22 to elect visitors annually; the duty of providing the asylum is by s. 2 cast upon the justices generally.

Looking, therefore, to the general object of the Act, as evidenced by its provisions, it seems that the intention is to cast a responsibility upon the justices of every county to provide county lunatic asylums, and to depute a selected number of their body for the building and maintenance of such asylums, including the appointment of officers and provision for their residence, which would seem to involve the imposition upon the justices as a body of all fiscal responsibilities necessarily arising out of the position in which they are placed, and as between the justices generally and the committee of visitors, the view that the justices are liable is strengthened by the consideration of the fact that a fresh committee of visitors is elected annually (s. 22), and the justices have power from time to time to fill up the vacancies (s. 28), and also by the fact that the justices, not the committee of visitors (s. 46 et seq.), have power to defray the moneys, costs, and expenses payable for the purposes of this Act out of the rates.

There is not much authority affecting this question, but as far as it goes it seems to be in favour of the assessment. In *Reg.* v. *Justices of Worcestershire* (1) it was held that the justices as a body were not liable to poors'-rate in respect of the county

(1) 11 A. & E. 57

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hall, but this was upon the ground that the only purposes for which the justices used the hall as a body were for the administration of justice, and although some of them individually used the building for dining and sleeping this was not an occupation by the whole body, but in giving judgment Williams, J., says: "The magistrates form a body which is in the nature of a corporation for public purposes only."

In *Reg.* v. *Overseers of Fulbourn* (1) the question was fully discussed whether the committee of visitors of a pauper lunatic asylum were liable to poor-rates beyond the value at which the land was assessed at the time of its purchase. It was held that they were not, but any point such as is now raised was not taken either by counsel or by the judges who decided that case. In *Justices of Lancashire* v. *Cheetham* (2) it was held that the justices of the county were rateable to the relief of the poor for the courts built for the Manchester Assizes in respect of an amount which they received for the accommodation required for the city quarter sessions and for the city court of record.

In *Coomber* v. *Justices of Berkshire* (3) the point now under consideration does not appear to have been discussed at the bar or to have been decided by either of the learned judges, Grove, J., and Huddleston, B., before whom the case was argued in the Queen's Bench Division. In the Court of Appeal Brett, L.J., appears to have expressed a clear opinion that the justices could not be assessed upon the ground that they are not a corporation, nor are they an association of persons at all, unless they be assembled in quarter sessions. "The justices," he goes on to say, "have no property belonging to them as justices upon which anything could be levied, and it can hardly be maintained, I should think, that this tax could be recovered from them individually and personally." Baggallay, L.J., after saying that he adopts the view that the justices must be regarded as the occupiers of the premises, adds: "I am, however, unable to assent to the proposition that there is any beneficial occupation of the premises by the justices, or that the premises are capable of beneficial occupation or enjoyment by any one. In any view of

(1) 6 B. & S. 451. (2) Law Rep. 3 Q. B. 14.
(3) 9 Q. B. D. 17; 10 Q. B. D. 267; 9 App. Cas. 61.

the case, it can hardly be disputed that the justices have not any present beneficial occupation or enjoyment of the premises; and inasmuch as, by virtue of the statute 21 & 22 Vict. c. 92, and of the conveyance made thereunder in 1859, the assize courts and the police station were, on the 6th of April, 1859, and have ever since been, vested in the clerk of the peace upon trust for the public uses or purposes of the county, they have been and are incapable of any such beneficial ownership or occupation as could render the owner or occupier liable to be charged in respect thereof."

The decision of the above case, however, in all the courts turned upon the point that the apartments in question were occupied for Crown purposes, and therefore the above dicta, though entitled, we need scarcely say, to every possible respect and consideration, are not binding; and when the case came before the House of Lords the learned lords by whom it was decided appear to have declined to deal with the question of who could properly be made liable as occupiers, provided an assessment could legally have been made; and Lord Blackburn, at p. 72, says: "I do not think it necessary to say anything on what I may call the technical answers on which the respondent's counsel, and, I think (to some extent), Brett, L.J. relied. I do not much doubt that, if the premises were taxable, means would be found for obtaining payment."

Lord Watson appears also to have differed from the observations made by the judges in the Court of Appeal upon this point of the case.

The case is not without some difficulties in whatever light it may be viewed, but, for the reasons we have given, it appears to us that the Crown is entitled to the judgment of the Court.

Since this judgment was written there is a case of *Tunnicliffe* v. *Overseers of Birkdale* (1) which came before the Master of the Rolls and Fry and Lopes, L.JJ., in the Court of Appeal. I need only say that was a case in which that Court took the same view as we have done with regard to the occupation of a reformatory school. The same arguments were there used; but the judges came to the conclusion that a reformatory school could not be considered as a school occupied for Crown purposes.

(1) 20 Q. B. D. 450.

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There will be judgment for the Crown.

Judgment for the Crown.

The justices appealed.

1889. Jan. 31. *Gainsford Bruce, Q.C.*, and *Smyly*, for the appellants. The justices are not a body known to the law, and cannot be assessed, nor can the committee of visitors. Neither body is corporate, and, moreover, neither has any property in the asylum, which would be vested in the clerk of the peace under 34 & 35 Vict. c. 14, nor are they occupiers. Under the Lunatic Asylums Act, 1853, the justices are to provide the asylum, but the entire management is vested in the committee of visitors. The assessment was therefore wrong. Further, the property is incapable of producing profit, and cannot be the subject of either poor-rates or income tax: *Coomber* v. *Justices of Berks.* (1)

[They cited *Reg.* v. *Justices of Worcestershire.* (2)

Sir Edward Clarke, S.G., and *A. V. Dicey*, for the Crown. The justices use the asylum and occupy it for a particular purpose by means of their officers. The decision of the Court below was right that the premises are not exempt, and is in accordance with *Tunnicliffe* v. *Overseers of Birkdale.* (3)

Gainsford Bruce, Q.C., in reply.

Jan. 31. LORD ESHER, M.R. This is a case stated under the Taxes Management Act, 1880, 43 & 44 Vict. c. 19, s. 59. Let us see what case can be stated and upon what case we are bound to give an opinion. On the determination of any appeal under the Income Tax Acts by the special commissioners, the appellant, or the surveyor, may, if dissatisfied with the determination as being erroneous in point of law, declare his dissatisfaction, and require the commissioners to state a case for the opinion of the High Court. The case is to set forth the facts and the determination. That means that the case is to raise the question of law which the commissioners have determined and to which the appellant has objected as wrong in law, and by sub-s. 2 the High Court is to hear and determine the question or questions of law arising on

(1) 10 Q. B. 267; 9 App. Cas. 61. (2) 11 A. & E. 57.
(3) 20 Q. B. D. 450.

the case. Now what was the question of law raised by the clerk of the peace? Not that if this part of the lunatic asylum was assessable the justices or the visiting committee were not the people to be assessed but some one else, but that no one was assessable, or, in other words, that these parts of the asylum were not assessable at all. The determination of the commissioners was taken upon that point of law and that alone. If that is so, that was the only point with regard to which a case could be stated, and if in the case any other point is stated it is one that should not be in the case, and which no Court is bound to answer. The point raised before us to-day may have been mentioned in the Divisional Court, but whether it was argued or not, it was a point not raised by the decision of the commissioners, and is not a question on which I feel called to give any opinion.

The only question which is before us is, whether these parts of the asylum are taxable. This has not been argued before us but practically given up, and, looking at the cases that have been decided, particularly the case of the reformatory school, I have no doubt that these parts of the asylum are assessable. The appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. The only possible matter of substantial dispute in this case was whether these parts of the asylum were assessable to income tax or not. If they are it can make no difference whether they are assessed in the name of the justices, or of the committee of visitors, or of the clerk of the peace, because the amount would be paid out of the rates whichever names are put on the rate-book. When the matter came before the commissioners no one took the point that the rating was in the wrong names. The only point taken was that neither the justices nor the committee were assessable, that is, that the premises were not assessable at all. Imagine the clerk of the peace coming before the commissioners to take the point that the assessment should not be on the justices but on himself! yet that is the contention when the case comes here. There is another class of persons who might possibly be assessed —the persons who occupy these rooms; but it would be equally technical to argue that they should be assessed, for, even if they

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were the persons who should appear on the assessment books, in the end the money would come out of the rates, because the claim of the officers to be repaid the amount would certainly be admitted. These technical points were not therefore taken before the commissioners, but the technicality arose afterwards when the question was raised before the Court who of all these people ought to be assessed. As that formed no part of the question in litigation before the commissioners, and as their determination was not on any such point, raising it now is a mere attempt to escape paying costs. The appellants are wrong on the main point, but they would get costs if they were right on this bye-point; that is the reason it is taken, and that is the reason why we decline to decide it.

FRY, L.J. I am entirely of the same opinion. The only real point is this: was this property in the occupation of the Crown either directly or through persons using it exclusively in and for the service of the Crown? In the case of *Greig* v. *University of Edinburgh* (1), that is stated by Lord Cairns to be the only ground of exemption under the Poor Law Acts, and that applies equally to the present case. To that question in this case the only answer is, that the asylum is not in such occupation; in point of fact the question has been barely referred to in the argument before us.

We have only to determine questions of law arising on the case transmitted to us under the Act. The point raised in the present case is this: the clerk of the peace contended that neither the justices nor the committee of visitors were liable to pay income tax under Schedule A. in respect of the apartments occupied by the medical officers and the chaplain, and there are eight grounds by which the contention is supported. The point raised is not that the assessment is wrong, nor that the county justices are not the owners, but that neither they nor the committee of visitors are liable to pay, whether as owners or occupiers is immaterial. That is the only point raised. It is quite true that certain admissions are signed which are called an amended special case, but which are not a part of the special

(1) Law Rep. 1 H. L., Sc. 348.

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case at all. They do not come from the commissioners. They raise, no doubt, the question whether the justices of the county for the time being are chargeable, but that is a question which we are under no obligation to answer. The only points which we have to determine are points of law arising upon the case, and the only point of law arising on the case is, whether neither the county justices nor the committee of visitors are liable to pay. It is clear that one or the other is liable, and there we leave it.

The appeal must be dismissed.

Appeal dismissed.

Solicitors for the justices: *Ridsdale & Son, for Wilson & Hulton, Preston.*

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

A. M.

[IN THE COURT OF APPEAL.]

Jan. 28.

HART *v.* THE STANDARD MARINE INSURANCE COMPANY, LIMITED.

Insurance, Marine—Warranty—"Iron," "Steel."

A policy of insurance on a ship contained a clause "Warranted no iron, or ore, or phosphate cargo, exceeding the net registered tonnage." In an action on the policy against the underwriters:—

Held, by the Court of Appeal, affirming the judgment of Mathew, J., that the warranty was broken by shipping a quantity of steel in excess of the net registered tonnage.

APPEAL from a judgment of Mathew, J., at the trial of the cause without a jury.

The action was brought on a policy of insurance on a ship, effected by the plaintiff with the defendants, who were underwriters, to recover for a partial loss.

The policy contained the following clause: "Warranted no iron, or ore, or phosphate cargo, exceeding the net registered tonnage." On the voyage during which the loss arose the ship carried, in addition to parcels of sheet iron and iron rails, a quantity of steel blooms, the weight of which exceeded the net registered tonnage. The question at the trial was whether there had been a breach of the warranty. The learned judge decided that

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steel was wrought iron so as to come within the meaning of the contract, and gave judgment for the defendants.

The plaintiff appealed.

Bigham, Q.C., and *J. Gorell Barnes, Q.C.*, for the appellant. The warranty is express, and it must be construed according to the meaning attached to the words by business men, and does not bind the insured beyond the commercial import of the words: Marshall on Marine Insurance, 4th ed., p. 280; Arnould's Marine Insurance, 6th ed., p. 605. In a business transaction different things are described by the words "steel" and "iron." A contract for steel rails would not be fulfilled by delivery of iron, and an insurance on steel rails would not cover iron rails.

[They cited *Scott* v. *Bourdillion* (1); *Blackett* v. *Royal Exchange Assurance Co.* (2); *Moody* v. *Surridge.* (3)]

Kennedy, Q.C., and *Joseph Walton*, for the defendants. Steel is iron that has gone through a process, and comes strictly within the terms of the warranty. The only meaning that can be attached to the word "iron" so as to carry out the object of the warranty is that it is used as a generic word, and includes all descriptions of iron.

J. Gorell Barnes, Q.C., in reply.

LORD ESHER, M.R. The first question in this case is what is the rule of construction to be adopted in the case of a warranty in a policy. Now the rule is laid down in Marshall on Marine Insurance that a warranty like every other part of the contract is to be construed according to the understanding of merchants, and does not bind the insured beyond the commercial import of the words. This has been adopted by later writers, both American and English, and is a declaration that the words are not to be construed in the sense in which they would be used amongst men of science, but as they would be used in mercantile transactions. The learned judge who had to try this case had to construe the warranty according to its ordinary acceptance among the class between whom the documents passed, unless by usage it had acquired a wider or narrower interpretation among men of that

(1) 2 B. & P. (N. R.) 213. (2) 2 C. & J. 244.
(3) 2 Esp. 633.

class. The next question then is, what is the ordinary sense in which the words used in this warranty would be accepted by mercantile men engaged in the business of insurance? If the words are capable of two meanings you may look to the object with which they are inserted, in order to see which meaning business men would attach to them. That appears by *Moody* v. *Surridge* (1), for Lord Kenyon evidently took the object of the clause into consideration, and must have asked the jury whether, as that object was to free the underwriters from trifling losses in the case of articles insured which were of a perishable nature, corn, which was to be free from average, would not include malt. If, therefore, iron can include steel the learned judge had a right to consider the purpose of the warranty.

The learned judge has held, and I think rightly, that, in this warranty, primarily "iron" would include "steel," and it is not enough to displace this to shew that in other mercantile matters, or in the body of the policy, the words would have a distinct meaning. The learned judge was of opinion that there was no evidence to shew that in such a warranty there was a usage as to any limited meaning of the expression "iron." The two questions for a jury would be whether such a warranty had become common; if not, there would be an end of the plaintiff's case. The other question would be whether if the warranty was a common one, the words had acquired by usage a distinct meaning in the warranty. The learned judge was of opinion that the plaintiff had failed to produce evidence on either point, and I think under the circumstances he was absolutely right.

BOWEN, L.J. I feel no doubt that the decision was perfectly right. The same broad rules of construction apply to the interpretation of a warranty as apply to all commercial documents. I do not think there is a better exposition of this than given by Lord Eldon in *Robertson* v. *French*. (2) "The same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz., that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense,

(1) 2 Esp. 633.

(2) 4 East, 130, at p. 135.

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unless they have generally in respect of the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense, distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense." It is to be remembered in construing such a document that it is a commercial one used for insurance purposes, and coming to this particular policy, what are the words we have to construe? Not words describing the subject-matter to be carried, nor subject-matter to be sold or delivered, but a clause, the object of which is to exclude from the ship goods the carriage of which would be dangerous to the ship. There is no business man who is not aware that steel is iron that has been subject to a process. On the other hand, no one would suppose that steel included iron. The first question then is, what is the meaning of the word "iron" used in this context. There was evidence to shew that in contracts of sale, bills of lading, and charterparties, business men would not describe or identify steel as iron. It is natural enough that in describing individual matters of commercial contract such matters should be described specifically, and if for the purpose of insurance it is necessary to describe steel specifically, the term "iron" would be inappropriate. In this case there is no such desire to describe specifically or to identify goods, but to exclude generally a certain class of cargo having certain physical qualities from the ship, and in such a case one would expect to find a generic term and not a specific description. I should, therefore, construe the word "iron" in such a clause in its generic sense, and as comprehending a cargo of steel. That being the construction I should place on the warranty let us see how the authorities bear on the question of parol evidence as to usage. In *Coit* v. *Commercial Insurance Co.* (1) parol evidence was admitted to shew that roots were perishable in their nature, and that sarsaparilla was not considered to be so, so that it would not be included in a memorandum which mentioned roots. That case shews that evidence is admissible to establish a usage modifying the ordinary use of

(1) 7 John. (Amer.) 385.

words found in a memorandum. The cases of *Scott* v. *Bourdillion* (1), *Moody* v. *Surridge* (2), and *Mason* v. *Skurray* (3) are commented on in Parsons on Marine Insurance, vol. i., p. 627, and go to prove the same thing. But all this reference to authorities comes to nothing, unless it can be shewn that in the particular warranty before us the words employed have obtained by usage a particular meaning. That is where this parol evidence broke down, and for the best of reasons, because there seems every probability that these clauses are new, and that in fact no usage has sprung up in regard to them. I think, therefore, that the judgment of the learned judge was right, and that the appeal should be dismissed.

FRY, L.J. The question is, what is the meaning of the words that occur in this warranty as they are used in the English language by ordinary persons. It is a matter of common knowledge that steel is a form of iron, and an expression used with the intention of excluding iron would be intended to exclude steel. That being so, it is incumbent on the plaintiff to shew that, in this context, the word is used in a more limited sense. The plaintiff tries to meet this obligation by shewing that in certain documents when steel is dealt with it is called steel, and when iron is dealt with it is described as iron. But there is a difference between the subject-matter of a contract and an exclusion of a class of things from the contract. In an affirmative description of some subject-matter the mind inclines to be specific, but in the case of exclusion the mind naturally tends to the use of general terms. In this case, which is one of exclusion, there is no evidence which tends to cut down or restrict the ordinary and general scope of the words, and therefore, for the purposes of this warranty, iron in its wide and general sense includes that which is described specifically as steel. I agree, therefore, with the learned judge, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Rowcliffes, Rawle & Co., for Stone, Fletcher & Hull, Liverpool.*

Solicitors for defendants: *W. A. Crump & Son.*

(1) 2 B. & P. (N. R.) 213. (2) 2 Esp. 633.

(3) Marsh. Insurance, 4th Edit. 169.

A. M.

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Jan. 17, 18.

ISITT AND OTHERS, EXECUTORS *v.* THE RAILWAY PASSENGERS ASSURANCE COMPANY.

Insurance—Insurance against Accident—"Effects of injury caused by accident"—Power of Arbitrator to state a Special Case under the Common Law Procedure Act, 1854, *s.* 5.

The assured under a policy granted by the defendant company against "death from the effects of injury caused by accident," fell and dislocated his shoulder. He was at once put to bed and died in less than a month from the date of the accident, having been all the time confined to his bedroom. In a case stated in a reference under the defendants' special Act the umpire found that the assured died from pneumonia caused by cold, but that he would not have died as and when he did had it not been for the accident, that as a consequence of the accident he suffered from pain and was rendered restless, unable to wear his clothing, weak, and unusually susceptible to cold, and that his catching cold and the fatal effects of the cold were both due to the condition of health to which he had been reduced by the accident:—

Held, that the death of the assured was due to the "effects of injury caused by accident" within the meaning of the policy.

The defendants' special Act provided for the reference to arbitration of any question arising on any of their contracts of insurance, and that the "submission to any such arbitration" might be made a rule of Court:—

Held, that the umpire in a reference under the Act had power to state a special case for the opinion of the Court under the Common Law Procedure Act, 1854, s. 5.

SPECIAL CASE stated by an umpire under s. 5 of the Common Law Procedure Act, 1854.

The claim referred was brought by the plaintiffs, the executors of one Isitt, against the defendants, the Railway Passengers Assurance Company, to recover 500*l.* under a policy according to which this sum was payable by the company to the legal representatives of the assured in case he should "sustain any injury caused by accident" and should die from the "effects of such injury" within three months from the time when it took place. In case of "any such injury which should not be fatal" the assured was entitled to an allowance from the company of 3*l.* a week for any period not exceeding one year for which he shall be "incapacitated from following his usual employment in consequence of such injury."

In the agreement of reference it was recited that upon the claim being made the defendants demanded a reference pursuant to the Railway Passengers Company's Act, 1864 (27 & 28 Vict.

c. cxxv.), that the plaintiffs and the defendants thereupon each appointed an arbitrator, and that such arbitrators being unable to agree upon an umpire, the umpire who stated the case was appointed by a master at chambers; and it was also thereby agreed that the provisions of the Act should apply to the submission contained in the agreement, and that the submission should, if necessary, be made a rule of Court. Sect. 3 of the Act provides that "any question from time to time arising on any contract of insurance . . . whether as to the liability of the company, or as to the amount, or proportionate amount, of compensation, or otherwise, shall, if either the company or the assured, or the representatives of the assured, require it, be referred to arbitration under this Act"; and by s. 32 "the submission to any such arbitration may be made a rule of any of the superior courts, on the application of either of the parties."

The circumstances under which the claim was made were stated in the case as follows:—

On October 24, 1887, the assured fell down at the Broad Street Railway Station. It was admitted by the company that this fall was an accident within the meaning of the policy. By the fall the assured dislocated his shoulder. He was taken home and put to bed, and he died on November 22, 1887, without having left his bedroom, and without having left his bed except for necessary purposes.

The fact that the shoulder was dislocated was not detected by the medical attendant who attended the assured, in consequence, as was stated by him, of the amount of the swelling. On October 31 the dislocation was discovered and was reduced by a consulting surgeon who was then called in. A few days afterwards the assured was discovered to be suffering from pneumonia, and he died from that disease.

Evidence was given on both sides upon the question whether the pneumonia from which the deceased died was directly caused by the accident, and it was admitted on the part of the defendants that pneumonia might result as a direct consequence from some accidents. The umpire found as a fact that the pneumonia from which the deceased died was not pneumonia caused directly by the accident, but was pneumonia resulting from cold. The

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umpire found, however, that the deceased would not have died as and when he did if it had not been for the accident; that he suffered great pain as a consequence of the accident, and was extremely restless, and unable to bear his usual clothing or any heavy or warm clothing on him; and that he was reduced by the accident to a state of debility in which he was more susceptible of cold than he would have been but for the accident, and was also less able to resist the effects of any illness which might come on him. The umpire also found that the pneumonia from which the deceased died arose from his catching cold during his illness from the accident; that he caught the cold by being exposed in some way to cold air, but that such exposure could, on the evidence, only have been slight and not such as would have caused his death if he had been in a normal state of health; and that his catching cold and the fatal effects of the cold were both due to the condition of health to which he had been reduced by the accident.

The defendants contended that under these circumstances they were only bound to pay compensation in respect of an injury which had not been fatal, and tendered 12*l.* 10*s.* to the executors. Subject to the opinion of the Court on the case the umpire found and awarded that the death of the assured was not a death "from the effects of the injury caused by the accident" within the meaning of the policy, and that the tender was sufficient. The question for the opinion of the Court was, whether the defendants were liable to pay the executors 500*l.* instead of this sum.

F. C. Gore, (*Finlay, Q.C.*, with him), for the defendants, took the preliminary objection that the umpire had no power to state a special case. This is not a reference by consent within s. 5 of the Common Law Procedure Act, 1854. (1) It is a compulsory

(1) By the Common Law Procedure Act, 1854, s. 5: "It shall be lawful for the arbitrator upon any compulsory reference under this Act, or upon any reference by consent of parties where the submission is or may be made a rule of any of the superior Courts of Law or Equity at Westminster, if he shall think fit, and if it is not provided to the contrary, to state his award, or the whole or any part thereof, in the form of a special case for the opinion of the Court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the Court."

reference under s. 3 of the Railway Passengers Assurance Company's Act of 1864, by which "any question arising on any of" the company's "contracts of insurance shall, if either the company or the assured or the representatives of the assured require it, be referred to arbitration." In *Rhodes* v. *Airedale Drainage Commissioners* (1) the Court of Appeal decided with some hesitation that an arbitration under the Lands Clauses Consolidation Act, 1845, in which each party had appointed an arbitrator, was a reference by consent in which a case might be stated under s. 5 of the Common Law Procedure Act, 1854. But the Lands Clauses Act provides alternative methods of settling disputes as to compensation, whereas under the Railway Passengers Assurance Company's Act of 1864 arbitration is the only possible course.

Henn Collins, Q.C. (*H. F. Dickens*, with him), for the plaintiffs. The claim arises on a contract which incorporates the clauses of the Railway Passengers Assurance Company's Act, 1864, with respect to arbitration. The agreement to refer was therefore part of the contract of the parties, and a reference in pursuance of it is a reference by consent. In *Rhodes* v. *Airedale Drainage Commissioners* (1), the decision turned on s. 25 of the Lands Clauses Act, by which the appointment of an arbitrator by either party is "to be deemed to be a submission" to arbitration. Sect. 32 of the Railway Passengers Assurance Company's Act, 1864, provides that "the submission may be made a rule of Court."

[He was stopped.]

The defendants are liable. The case finds that the cause of death was "pneumonia resulting from cold," and that "the cold and the fatal effects of the cold were both due to the condition of health to which the assured had been reduced by the accident." This is tantamount to a finding that the assured died "from the effects of the injury caused by the accident." In a discussion of the meaning of an insurance in these terms in *Sinclair* v. *Maritime Insurance Company* (2), Cockburn, C.J., instanced as an example of death from "the effects of injury caused by accident," the case of a shipwrecked sailor dying from cold and exposure consequent upon his having to remain at sea for some time in an

(1) 1 C. P. D. 402. (2) 30 L. J. (Q.B.) 77.

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open boat owing to the loss of his ship. In an action against a carrier or an innkeeper for breach of contract, damages would be recoverable in respect of death or injury resulting from exposure consequent upon the unpunctuality or the failure to provide accommodation: *McMahon* v. *Field* (1); *Hobbs* v. *South Western Ry. Co.* (2) *Lawrence* v. *Accidental Insurance Company* (3), and *Smith* v. *Accidental Insurance Company* (4), may be cited on the other side, but the present policy does not contain conditions such as in those cases were held to protect the insurers.

Finlay, Q.C. (*F. C. Gore*, with him), for the defendants. The question raised is purely one of fact and has been decided by the umpire in favour of the defendants. If his finding can be reviewed, it is still conclusive in their favour, unless as a matter of law he was bound to have found in favour of the plaintiffs. According to the case, the assured died from pneumonia caused by cold, and not caused by the accident. In other words, pneumonia caused by cold was the proximate cause, and in law the only cause of death. Similarly in marine insurance where a ship sails in an unseaworthy state, and is in consequence lost by a storm, the perils of the seas are regarded as the proximate cause of the loss: see per Blackburn, J., in *Dudgeon* v. *Pembroke* (5). Had the insurance been against death by disease instead of against death by accident, the defendants would have been liable. If the order of events had been reversed and the deceased while insured under the present policy had first caught pneumonia, and then, in consequence of the debility produced by that disease, had had a severe fall and been killed, the defendants would have been liable. Suppose that a person holding two insurances, one against railway accidents, the other against accidents of any other kind, met first with a railway accident which weakened him, and then was run over in the street by an omnibus, receiving injuries from which he died, but from which he would not have died but for the prior effects of the railway accident, it would be absurd to say that the railway accident was in law the cause of death.

(1) 7 Q. B. D. 591.
(2) Law Rep. 10 Q. B. 111.
(3) 7 Q. B. D. 216.
(4) Law Rep. 5 Ex. 302.
(5) Law Rep. 9 Q. B. 581, at p. 595.

In *Lawrence* v. *Accidental Insurance Company* (1), the assured, under an accidental policy excluding "death arising from fits," fell in a fit from the platform at a railway station on to the line and was there run over and killed by a passing train. The Court held that the company was liable, as the death did not "arise from" the fit. In *Smith* v. *Accidental Insurance Company* (2), where an accident policy excluded "death arising from erysipelas," and the insured cut his foot by accident, and erysipelas followed with fatal results, the Court held, that the death was caused not by the accident but by the supervening erysipelas, and that the company were protected. According to the principle contended for on the other side, these decisions were erroneous, and in the one case the fit and in the other the accident, as they happened first respectively, should have been held to be the cause of death.

Henn Collins, Q.C., in reply. The question raised is one of law equally with that decided in *Dudgeon* v. *Pembroke*. (3) If a person insured under a policy in this form meets with an accident rendering the amputation of a limb necessary and dies while undergoing the operation, it is clear that the death is within the terms of the policy. The results described in the case are equally, though less directly, "effects of the injury caused by the accident."

HUDDLESTON, B. I have felt some difficulty as to the question of law intended to be raised. I assume, however, that the umpire finds that the accident was not, as a matter of fact, the proximate cause of the death of the assured, and that therefore, according to his own opinion, the assured did not die "from the effects of injury caused by accident," but that he leaves it to the Court to say whether or not, as a matter of law, having regard to the medical history of the illness as stated in the case, it ought to be held that the assured died from the natural consequences of injury caused by accident," and therefore from "the effects of injury caused by accident" within the meaning of the policy.

This being the question of law raised, I think it important that the terms of the policy seem themselves to draw a distinction

(1) 7 Q. B. D. 216. (2) Law Rep. 5 Ex. 302.
(3) Law Rep. 9 Q. B. 581.

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between the accident and its "effects." The words are, "if the assured shall sustain any injury caused by accident, ... and shall die from the effects of such injury." These words appear to me to mean that the injury must be immediately caused by the accident but that the death need not be immediately caused by the injury. Now I think that the facts stated by the umpire do shew that in this case, though the injury was not the proximate cause of the death of the assured, yet his death did ensue from the natural consequences of the injury. The cause of death is found to have been pneumonia resulting from cold which proved fatal a month after dislocation of the shoulder through a fall under circumstances which are thus stated: "By the fall the assured dislocated his shoulder. He was taken home and put to bed, and he died without having left his bedroom, and without having left his bed except for necessary purposes . . . He died from pneumonia resulting from cold. I find, however, that the deceased would not have died as and when he did if it had not been for the accident. He suffered great pain as a consequence of the accident, and was extremely restless and unable to bear his usual clothing or any heavy or warm clothing on him. He was reduced by the accident to a state of debility in which he was more susceptible of cold than he would have been but for the accident, and was also less able to resist the effects of any illness which might come on him. I find that the pneumonia from which the deceased died arose from his catching cold during his illness from the accident, that he caught the cold by being exposed in some way to cold air, but that such exposure could, on the evidence, only have been slight and not such as would have caused his death if he had been in a normal state of health. I find that his catching cold and the fatal effects of the cold were both due to the condition of health to which he was reduced by the accident." More shortly, the assured fell and dislocated his shoulder; he was in consequence confined to his room; he there suffered pain, became restless and unable to wear his clothes, and was reduced to a condition of debility. He thus became unusually susceptible to cold; he caught cold, and in consequence pneumonia; and he died of pneumonia. These facts appear to me to constitute a

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chain of circumstances leading naturally from the injury to the death. The question of law is then whether or not, as a matter of law, the chain of circumstances ought be taken into consideration as "effects" under this insurance. Construing, as I do, the terms of the insurance as meaning that the injury must be immediately caused by the accident, but that death need not be immediately caused by the injury, I answer this question in the affirmative. I think the circumstances which followed were in contemplation of law "effects" of the injury. I am, therefore, of opinion that the assured died "from the effects of the injury" within the meaning of the policy, and that the plaintiffs are entitled to recover the amount of the insurance.

WILLS, J. I am of the same opinion. The case is an example of a difficulty which often arises with respect to a special case. Had the question been raised by a trial in Court any deficiency or ambiguity in the evidence on either side could have been easily remedied by further inquiry. The difficulty is due to the essentially rigid and inelastic nature of the method by which the facts are brought before the Court. I assume, however, that the question raised for our opinion is, whether the facts found by the umpire, with reference to the accident, the injury to the assured, and his subsequent illness and death, constitute a state of things in which the plaintiffs, as his executors, are entitled to recover the amount of the insurance.

The policy appears to provide that in order that the plaintiffs may recover it is necessary that the accident should have caused injury to the insured, and that such injury should have caused his death. During the argument I was inclined to place stress upon the use of the word "effects" in the policy. But "cause" and "effect" are correlative terms, and I am now content to construe the word "effects" from that point of view. If, then, the injury causes the death of the assured in the sense that he dies instantly from it, no question can arise. He has clearly died from "the effects" of the injury within the meaning of the policy. But if, as here, the assured lives for some time after the injury, during this time he must live as an invalid, subject to the ordinary conditions of such a mode of life. These conditions of life are

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something distinct from the injury, but, when a question arises as to whether the death of the assured while subject to them was caused by the injury, it becomes essential to take into consideration these conditions of life as well as the injury, and not only these conditions, but such things as are either inseparable from them or are their natural consequences. The question is very like those which often arise in respect of damages. Damages must be, all the circumstances taken into consideration, not too remote, but the natural consequence of that which gives the right to recover them. Was, then, the death of the assured under the circumstances stated the natural consequence of the injury? I think it was. I think it idle to suggest that there is anything in these circumstances which tends to shew that the cold which led to the fatal attack of pneumonia was caught by the assured in some manner independent of the injury. The umpire seems to me to have found that the assured caught cold owing to his having been made an invalid by the injury and having in consequence to live as an invalid, and that the cold was due to some slight cause impossible to specify, but incident to the conditions of such a life, and which would not, apart from the debility produced by the injury, have caused his death. I think that on the facts as found, there is no pretence for treating the death as less due to the injury because one step in the train of circumstances which followed was that the assured caught cold. These facts appear to me to present the exact negative of the case suggested of a person who having been weakened in a railway accident is then run over in the street by an omnibus. In that case the fatal injury caused by the omnibus is something altogether foreign to and independent of the railway accident, whereas here the facts shew that the death of the assured was due, not to any foreign or independent cause, but to the natural consequences of the injury.

Had the issue been submitted to a jury, I think that the proper direction would have been: "Do you think that the circumstances leading up to the death, including the cold which caused pneumonia, were the reasonable and natural consequences of the injury and of the conditions under which the assured had to live in consequence of the injury? If you find that no foreign cause

intervened and that nothing happened except what was reasonably to be expected under the circumstances, you may and ought to find that the death resulted 'from the effects of the injury' within the meaning of the policy." I am therefore of opinion that the plaintiffs are entitled to recover the amount insured.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Richardson & Sadler.*
Solicitors for defendants: *Ingram, Harrison & Ingram.*

H. D. W.

[IN THE COURT OF APPEAL.]

Feb. 1.

CURTIS *v.* STOVIN.

County Court — Action for Sum not exceeding 100*l. commenced in High Court — Remitter to County Court for Trial — Jurisdiction — Retrospective Effect of Act — Action commenced before January* 1, 1889 *— County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 65.

By s. 65 of the County Courts Act, 1888 (which came into operation on January 1, 1889), "where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, ... it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried *in any court in which the action might have been commenced*, or in any court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly."

By s. 56, "All personal actions, where the debt, demand, or damage claimed is not more than 50*l.*, . . . may be commenced in the court." By s. 186 the word "court" or "county court" "shall mean and include any court held under this Act, and also the City of London Court, and shall include and mean the judge or registrar of the court:"—

Held, that s. 65 gives power to order the trial to take place in any county court in which the action (if the amount claimed had been such that it could have been commenced in a county court) might have been commenced:—

Held, also, that s. 65 applies to actions commenced before January 1, 1889.

APPEAL by the plaintiff against an order of a Divisional Court (Lord Coleridge, C.J., and Hawkins, J.) affirming a previous decision of Mathew, J., that the action should be tried in the Newark County Court.

The action was commenced in the High Court on July 24,

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1888. The writ was specially indorsed with a claim for 70*l.*, the price of growing seeds sold to the defendant. The defendant denied liability. Notice of trial was given on December 2, 1888, and on December 4 the action was set down for trial in Middlesex. On January 1, 1889, the County Courts Act, 1888, came into operation. On January 9 the defendant applied by summons in chambers for an order that the action should be tried in a county court.

Hextall, (*Stanger*, with him), for the plaintiff. The order appealed from purported to be made under s. 65 of the County Courts Acts, 1888. (1) But s. 65 cannot apply to an action for a sum between 100*l.* and 50*l.*, for such an action could only have been commenced in the High Court. Sect. 188 repeals the former County Courts Acts, subject to a saving clause. Sect. 65 has taken the place of s. 26 of the County Courts Act, 1856, and s. 7 of the County Courts Act, 1867; but the difficulty which arises on the construction of s. 65 of the present Act did not arise upon the corresponding sections of the prior Acts. Whatever may have been the intention of the legislature, the Court cannot insert words in the section to carry out that intention. In some cases it has been held that words may be omitted from a section of an Act of Parliament in order to construe it

(1) By s. 56 of the County Courts Act, 1888: "All personal actions, where the debt, demand, or damage claimed is not more than 50*l.*, whether on balance of account or otherwise, may be commenced in the court."

By s. 65: "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, or where such claim, though it originally exceeded 100*l.*, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding 100*l.*, it shall be lawful for either party to the action at any time, if the whole or any part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly."

By s. 186: "In construing this Act or any future Act relating to county courts, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned shall have or include the meanings following, (inter alia): 'Court' or 'county court' shall mean and include any court held under this Act, and also the City of London Court, and shall include and mean the judge or registrar of the court."

reasonably: *Stone* v. *Corporation of Yeovil.* (1) Sect. 65 does not apply to an action which was pending at the time when the Act came into operation. Sect. 188 provides that the repeal of the former Acts shall not affect existing rights: *Wright* v. *Hale* (2) is distinguishable.

[FRY, L.J. Would it not be reasonable to construe the words, "court in which the action might have been commenced" as meaning the court in which the action might have been commenced with reference to the provisions of s. 74, having regard to the locality of the defendant's residence?]

It would be necessary then to exclude the limit of amount mentioned in s. 56.

Bucknill, Q.C., and *Henry Stephen*, for the defendant. Sect. 65 ought to be read as meaning that the Court may order the action to be tried "in any court in which (so far as regards the residences of the parties and the ambit of the court) the action might have been commenced," or "in any court in which (irrespective of the amount claimed) the action might have been commenced." Unless some such words are inserted or understood, s. 65 will be wholly inoperative as regards actions for amounts between 100*l.* and 50*l.* In order to give a sensible construction to a statute the Court will either omit, or introduce, or imply words: Maxwell on Statutes (2nd ed.) p. 274; *Becke* v. *Smith* (3); *Attorney-General* v. *Lockwood* (4); *Overseers of Wigton* v. *Overseers of Snaith* (5); *Jubb* v. *Hull Dock Co.* (6); *In re Waineright.* (7)

[LORD ESHER, M.R., referred to *Rex* v. *Emden* (8); *Green* v. *Wood* (9); *Antony* v. *Cardigan* (10). In the latter case the Court of King's Bench held that, for the purposes of poor law settlement, a widower who had a daughter who was married into another parish and there settled, was, within the meaning of 3 Wm. & M. c. 11, s. 6, "an unmarried person not having child or children:" *vide* Const on the Poor Laws (5th ed.) vol. 2, p. 177.

(1) 1 C. P. D. 691.
(2) 6 H. & N. 227.
(3) 2 M. & W. 191, 197.
(4) 9 M. & W. 378, 398.
(5) 16 Q. B. 496.
(6) 9 Q. B. 443.
(7) 1 Phil. 258.
(8) 9 East, 437.
(9) 7 Q. B. 178.
(10) 2 Bott's Poor Law Decisions, p. 194.

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BOWEN, L.J., referred to *Lyde* v. *Barnard*. (1)]

When the language of an Act is ambiguous and difficult to construe, the Court can refer to rules made under the provisions of the Act to assist it in determining the construction: *Ex parte Wier* (2).

[They referred also to s. 7 of the County Courts Act, 1867, and s. 114 of the County Courts Act, 1888.]

Hextall, in reply. There is no absurdity in construing s. 65 literally as it stands; the only effect is to limit the power of transfer to actions in which an amount not exceeding 50*l*. is claimed.

[LORD ESHER, M.R. That would make the commencement of the section absurd; it would amount to reading 100*l*. as meaning 50*l*.]

In *Green* v. *Wood* (3) the Court preferred treating the words of an Act as having no meaning to introducing new words.

LORD ESHER, M.R. We have carefully considered this case, and we have consulted a number of authorities. If it were necessary to rely upon the case in Bott's Poor Law Decisions, in which it was held that a widower who had a daughter was for the purpose of a particular statute "an unmarried person not having child or children," I should be obliged to say that I do not understand the decision, and, even if I understood it, I could not agree with it. But I do not think that any of the cases which have been referred to will help us on the present occasion. It is, no doubt, very easy for a judge to say that he is introducing words into an Act only by way of construing it, while he is really making a new Act. But I shall endeavour only to construe the section with which we have to deal. This s. 65 relates to an order which is to be made by a judge as to the trial of an action, and it states certain conditions precedent to the making of the order. The action must be an action of contract brought in the High Court; the claim indorsed on the writ must not exceed 100*l*., or it must have been reduced by payment or set-off to a sum not exceeding 100*l*.; and the plaintiff's demand must be wholly or in part contested. Where these conditions exist, "it shall be lawful for

(1) 1 M. & W. 101, 115. (2) Law Rep. 6 Ch. 875.
(3) 7 Q. B. 178.

either party to the action" to apply to a judge of the High Court to order the action "to be tried in any court" (and as by s. 186 the word "court" means "county court" that must mean "in any county court") in which the action might have been commenced." I think (though there is considerable difficulty in so doing) that we may, by way of interpretation only, say that these words mean "in any county court in which, if it had been a county court action, the action might have been commenced." In the present case all the conditions precedent are fulfilled, and the difficulty arises in the description of the court to which the action may be remitted. I think it is plain that the legislature have misdescribed the court to which the transfer is to be made, but at the same time they have misdescribed it in such a way as to shew that there is a misdescription of the court. The alternative clause which follows, "or in any court convenient thereto," helps us in the construction, inasmuch as it refers to locality, and I think we may look back from it to the previous clause, and say that it must refer to the county court in the district of which the parties reside, or in which one of them resides. The section is, no doubt, very badly drawn, but I think that we are justified, while only interpreting it, in giving it the meaning which I have stated.

BOWEN, L.J. I am of the same opinion, and I agree with the Master of the Rolls that none of the previous cases will help us to construe this section. The rules for the construction of statutes are very like those which apply to the construction of other documents, especially as regards one crucial rule, viz. that, if it is possible, the words of a statute must be construed so as to give a sensible meaning to them. The words ought to be construed *ut res magis valeat quam pereat.* I propose to apply that rule in the present case. If we were to hold that under s. 65 the judge has no power to order that an action shall be tried in a county court unless it is an action which, as regards the amount claimed, might have been commenced in a county court, we should be making nonsense of the section. We must avoid such a construction, if the language will admit of our doing so. The section gives power to the judge to make an

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order transferring an action for trial from the High Court to a county court, and it begins by defining the conditions under which the order may be made. One of those conditions is, that the claim indorsed on the writ does not exceed 100*l.*, or that it has been reduced to a sum not exceeding 100*l.* If the specified conditions are fulfilled, what else has the judge to do? It seems to me that he has only to select the particular county court in which the trial is to be had. If that be the true interpretation of the section, the words which follow are words of selection and description, which are the words you would expect to find. The action may be ordered to be tried "in any court in which the action might have been commenced, or in any court convenient thereto." In order to give a sensible meaning to the words some addition must be made to them, because the action being, by reason of the amount claimed, a High Court action, could not have been commenced in a county court. I think we must introduce some words to this effect, "*if it had been a county court action*;" and then the section will read, "in any court in which the action, if it had been a county court action, might have been commenced." That will make the section sensible. The selection of the particular county court is to be made with regard to those county courts in which, if the action had been a county court action, it might have been commenced, or some court convenient thereto. On the ground that the words of the section clearly refer to a choice which is to be made among county courts, I think that the judge at chambers took a right view of the section.

FRY, L.J. I am of the same opinion. The language of the section is very unfortunate, but at the same time I think it is not difficult to ascertain the intention of the legislature. I think there is a plain indication of an intention that, when the amount claimed in an action of contract commenced in the High Court does not originally exceed 100*l.*, or where it has been reduced by payment or set-off to 100*l.*, there should be power to transfer the trial of the action to some county court. I think that intention is unaffected by the difficulty in the construction of the language of the section. This is emphasized by the new

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limit of 100*l.* which is fixed, while the limit of amount for an action to be commenced in a county court remains 50*l.* I think there is a plain indication of the intention of the legislature that such an action as is mentioned at the beginning of the section shall, if it be commenced in the High Court, be ordered to be tried in a county court, except in certain cases. If the legislature have given a plain indication of this intention, it is our plain duty to endeavour to give effect to it, though, of course, if the words which they have used will not admit of such an interpretation, their intention must fail. Do the words which they have used in this case present any insuperable difficulty? I think not. The conditions precedent to the making of the order are three, as has been already pointed out, and, when those conditions are found to exist, either party may apply to a judge to order the action to be tried "in any court,"—that clearly means "in any county court." But then come the words which create the difficulty, "in which the action might have been commenced." How would those words operate in the case of an action which is plainly within the section, an action the writ in which claims an amount not exceeding 50*l.*? It is plain that in such a case the words must have reference to the locality of the court, and it appears to me that they must have the same operation in the case of an action in which a larger amount than 50*l.* is claimed, and that the words were intended only to guide the exercise of the discretion of the judge in selecting the court in which he shall order the action to be tried. This view of the construction is fortified by the words which follow, "or in any court convenient thereto," which are plainly words of locality, and are addressed to the selection of the particular court. The only alternative construction offered to us would lead to this result, that the plain intention of the legislature has entirely failed by reason of a slight inexactitude in the language of the section. If we were to adopt that construction, we should be construing the Act in order to defeat its object rather than with a view to carry its object into effect.

LORD ESHER, M.R. The effect of s. 65 seems to be this, that any one who brings an action of contract for an amount between

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50*l.* and 100*l.* must commence the action in the High Court, and thereupon it must upon application be forthwith transferred to a county court for trial.

Appeal dismissed.

Solicitors for plaintiff: *Swann & Co., for Durance, Lincoln.*
Solicitors for defendant: *Stephen & Day.*

W. L. C.

Feb. 6.

THE QUEEN *v.* PARLBY AND OTHERS.

Local Government Acts—Nuisance from Sewage Works—Abatement—Order of Justices—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 27, 91 *to* 96.

The provisions of 38 & 39 Vict. c. 55 (the Public Health Act, 1875), ss. 91 to 96, for the abatement of certain nuisances, do not apply to a nuisance arising from sewage tanks and works constructed under s. 27 by a local board of health, and a court of summary jurisdiction has, therefore, no power, on proof of a nuisance so caused, to make an order for the abatement of such nuisance under s. 96.

ORDER calling upon the defendants to shew cause why a writ of certiorari should not issue to bring up an order of justices.

The facts, arguments, and enactments in question sufficiently appear in the judgment of the Court.

J. Alderson Foote, shewed cause. He cited: *Glossop* v. *Heston and Isleworth Local Board* (1); *Attorney-General* v. *Hackney Local Board* (2); *Sutton* v. *Mayor and Aldermen of Norwich* (3); *Mayor of Scarborough* v. *Rural Sanitary Authority of Scarborough* (4); *Whitaker* v. *Derby Urban Sanitary Authority* (5); *The Queen* v. *Wheatley* (6); *Ex parte Whitchurch* (7); *Ex parte Saunders* (8); *Colonial Bank of Australasia* v. *Willan.* (9)

Sir E. Clarke, S.G., and *R. S. Wright*, in support of the rule. [They cited *Attorney-General* v. *Guardians of Poor of Union of Dorking.* (10)]

Cur. adv. vult.

(1) 12 Ch. D. 102.
(2) Law Rep. 20 Eq. 626.
(3) 27 L. J. (Ch.) 739.
(4) 1 Ex. D. 344.
(5) 55 L. J. (M.C.) 8.
(6) 16 Q. B. D. 34.
(7) 6 Q. B. D. 545.
(8) 11 Q. B. D. 191.
(9) Law Rep. 5 P. C. 417.
(10) 20 Ch. D. 595.

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1889. Feb. 6. The judgment of the Court (Huddleston, B., and Wills, J.) was read by

WILLS, J. This is an application for a writ of certiorari to bring up an order of justices for the purpose of being quashed, on the ground that it was made without jurisdiction.

There is an urban sanitary district in the county of Devon, called the Compton Gifford district, for which the applicants are the local board. Contiguous to this district is the Plympton St. Mary rural sanitary district.

The Compton Gifford local board in or about the year 1881 carried out a system of drainage for their own district, part of the scheme was that certain subsidence tanks and other works for disposing of the sewage should be constructed and maintained without their district, and at a place within the district of the Plympton St. Mary rural sanitary authority. For this purpose, it was necessary, under ss. 27, 32, 34, of the Public Health Act, 1875, to obtain the consent of the Local Government Board, this consent was duly obtained, and the works thus sanctioned were carried out, though they were afterwards modified in some details.

The sewage works carried on at and about the subsidence tanks, caused bad smells and were a nuisance.

In April or May, 1888, the sanitary inspector of the rural sanitary authority of Plympton St. Mary (the respondents), acting under s. 93 of the Public Health Act, 1875, gave information to the respondents of the existence of the nuisance.

On the 8th May, 1888, the respondents gave notice under s. 94 to the Compton Gifford local board, the applicants, stating that "being satisfied of the existence of a nuisance arising from an offensive and injurious smell caused by the subsidence tanks constructed by" the applicants, they (the respondents) thereby required the applicants "within fourteen days from the service of this notice to abate the same, and for that purpose to remove the said subsidence tanks and to discontinue all flow of sewage into the said tanks or the site thereof."

The applicants disregarded the notice, and the respondents thereupon took out a summons against the applicants under s. 95.

The summons was heard on the 6th August, 1888, when the

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magistrates made an order of which the material parts are as follows:—

"Whereas on the 28th of May complaint was made before one of the justices of the peace for the county of Devon that in or on the subsidence tanks and the site thereof situated at Laira, in the district of" the respondents, "the following nuisance then existed, that is to say a nuisance offensive and injurious to health caused by smells arising from the said subsidence tanks and the contents thereof, and that the said nuisance was caused by the act and default of" the applicants, "the owners and occupiers of the said premises, and whereas the appellants have duly appeared before us," &c. "Now, on proof before us that the nuisance so complained of doth exist on the said premises and that the same is caused by the act or default of" the applicants. "We, in pursuance of the Public Health Act, 1875, do order" the applicants "within eight calendar months from the service of this order to discontinue the flow of sewage into the said subsidence tanks, and to remove the said tanks, and to discontinue the deposit of sewage matter in certain pits adjacent to, or near to, and connected with, the said subsidence tanks." This was the order brought up.

It was not disputed that it was a part of the scheme sanctioned by the Local Government Board that the sewage should flow into the tanks. The tanks had, it appeared upon affidavit, been altered from those originally sanctioned, but it was not alleged, and did not appear, that they had been altered in any material particular. The pits adjacent, which were spoken of as the "sludge pits," were no part of the original scheme, and had been added thereto. The notice given by the respondents to the applicants contained no reference to the sludge pits, and made no allegation that any nuisance arose from them, and did not require that anything should be done to them, and indeed neither the removal of the sludge pits or of the tanks would have been of the slightest use, unless the flow of sewage were discontinued, whereas if the flow of sewage were discontinued the subsidence tanks and the sludge pits would have been harmless; and without expressing any opinion how the case would have stood if the notice of the respondents and the order of the justices had been

confined to the sludge pits, we proceed to consider that which has been the substantial matter of contest between the parties, viz., whether the justices had power to order the discontinuance of the flow of sewage.

By s. 27 the powers conferred upon local boards to construct sewage works, whether within or without their district, are coupled with a proviso "that no nuisance be created in the exercise of any of the powers given by this section."

It was contended by Mr. Foote that the effect of this proviso was that if a nuisance were created the statutory authority was gone, and that the case must be treated as if the works had been constructed without any such authority at all; so that not merely must the nuisance be considered as unlawful, but the discharge of sewage matter at the point of outfall, and in fact the whole of the works for effecting the drainage of the district, must be treated as if they were constructed under no statutory authority and entitled to no statutory protection.

This proposition seems to us to be of the most extravagant kind, if it were true the escape of noxious vapours from a gully-hole in a large town in sufficient quantities to be a nuisance would put the whole of the works of an extensive district into the category of unauthorized works, and would prevent the application to them of the numerous sections giving protection and powers to the local authority in respect of works authorized by the Act. The meaning of the proviso seems to us perfectly clear, a class of works was authorized by the section which were peculiarly liable to create nuisances, and as to which questions might well arise whether it was possible by any known methods to avoid creating a nuisance. The enactment settles once for all the question whether, if a nuisance were created, it could be considered as authorized by statute, so that there should be no legal remedy in respect of it. It leaves the local authority creating the nuisance unprotected in respect of that nuisance, and liable to all consequences, as well statutory as at common law, applicable to the particular case; but it does nothing more, and does not, as was contended, eliminate from the case the fact that works to which the statutory authority originally extended were constructed and are maintained under the same authority.

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It was then argued that, however this might be, the sewage works in the Plympton district were a nuisance, and that under ss. 91–96 the justices had jurisdiction to entertain the complaint and make the order complained of. It becomes necessary therefore to examine these sections with some care. Sect. 91 begins by enumerating seven different things which shall be deemed to be nuisances liable to be dealt with summarily in the manner provided by the Act. They comprehend (1) premises in such a state as to be a nuisance or injurious to health; (2) any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain, or ash-pit so foul or in such a state as to be a nuisance or injurious to health; (3) any animal so kept as to be a nuisance or injurious to health; (4) any accumulation or deposit which is a nuisance or injurious to health; (5) over-crowded houses; (6) factories and workshops not kept in a cleanly state; (7) certain fireplaces and furnaces not consuming their own smoke, and certain chimneys sending forth black smoke, it being in all cases, except that of the fireplaces and furnaces, necessary that the mischief pointed out shall be either a nuisance or injurious to health; provided (inter alia) that no penalty shall be imposed on any person in respect of any accumulation or deposit necessary for the effectual carrying on of a business or manufacture if it be not kept longer than is necessary for the purposes of the business or manufacture, and the best available means have been taken to prevent its being injurious to the public health.

By s. 92 a duty is cast upon the local authority to provide inspection for the purpose of seeing that nuisances are abated.

By s. 93 information of a nuisance may be given to the local board by any person aggrieved, or by any two householders of the district, or by certain other persons.

By s. 94, upon such information the duty is cast upon the local authority, if satisfied of the existence of the nuisance, to give notice to the person responsible for it, requiring him, within a time to be specified, to abate the nuisance, and to execute such works and do such things as may be necessary for the purpose.

By s. 95 if the person so required shall fail within the specified time to abate the nuisance, or if the nuisance though abated be likely to recur, the local authority is to lay a complaint before a

justice, whereon a summons is to issue for the appearance of such person before a court of summary jurisdiction.

By s. 96, such court, if satisfied that the nuisance exists or is likely to recur shall make an order requiring the defendant to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time to be specified, or to prevent its recurrence, and do any works necessary for either of those purposes, and may impose penalties.

By a subsequent section (s. 98) penalties of so much per day may be imposed upon persons failing to comply with the order.

It has been decided that under these sections the justices must specify the particular works which they consider to be the proper ones for the above purposes, and that an order which fails to do so is bad: *Reg.* v. *Wheatley.* (1)

In our opinion the provisions we have stated have no application to sewage works constructed under the powers of s. 27; we think the words of s. 91 do not include them, and we think they were not meant to include them. It is clear that the expression "premises in such a state as to be a nuisance" has not the wide application claimed for it by the respondents, who say that it is answered by any premises on which a nuisance exists. If that were so the enumeration of, at all events, the several kinds of nuisance specified under heads 2, 3, 4, and 6, would be unnecessary; we do not attempt to define every class of case to which the first head applies, but we think it is confined to cases in which the premises themselves are decayed, dilapidated, dirty, or out of order, as, for instance, where houses have been inhabited by tenants whose habits and ways of life have rendered them filthy or impregnated with disease, or where foul matter has been allowed to soak into walls or floors, or where they are so dilapidated as to be a source of danger to life and limb.

It is a significant fact that under the second head the various receptacles for running or stagnant water which may be foul stop with drains, which, by the interpretation clause, are not sewers; and to take broader and higher ground, it seems to us incredible that when the legislature had entrusted the local boards with a most difficult and thankless task, in the execution of which there

(1) 16 Q. B. D. 34.

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was certain to be, as there has been in fact, a proportion of failures, involving, perhaps, a cost to the district of tens or even hundreds of thousands of pounds, and taxing the utmost resources of mechanical art and engineering skill to set them right, a jurisdiction should be conferred upon two magistrates, with an appeal to a recorder or to a bench of justices at quarter sessions, to substitute their judgment of the mode in which and the cost at which the mischief should be cured for that of the local board and their skilled advisers. It would be still more extraordinary if the legislature had conferred upon two magistrates the power of doing what the justices in the present case have assumed the right to do: viz. to set aside the scheme sanctioned, under parliamentary authority to do so, by the Local Government Board, and to say that the local board shall cease to discharge their sewage at the appointed outfall and in the appointed manner. A very different measure of consideration seems to us appropriate to the performance of a duty of extreme difficulty, and we prefer to say with the present Master of the Rolls, "They have a duty to perform, but a very difficult duty, and one that must naturally, therefore, require a considerable time, and anybody who has to deal with them, in finding fault with the ineffectiveness of what they have done, is bound to look at their conduct with the greatest indulgence": per Brett, L.J., in *Glossop* v. *Heston and Isleworth Local Board.* (1)

By s. 105 of the Public Health Act, 1875, private individuals may complain to the justices of a nuisance, and thereupon the justices shall have the same powers as under the sections we have mentioned. We think Mr. Foote is right in his contention that so far as the person or body complained of is concerned, the magistrates have jurisdiction to entertain complaints against a local board as well as against an individual. If the limitation we have suggested did not exist, it would be thus in the power of any individual in a district to summon a local board for a nuisance committed by them in the management of their sewage works, and, if his view be sustainable, that when they are guilty of such a nuisance the proviso upon which their statutory powers hang is violated, and the case is to be treated as if those statutory

(1) 12 Ch. D. 102, 119.

powers no longer existed, it would follow that upon the breakdown of the system in a particular street or locality occasioning a nuisance, it would be within the competence of two justices to direct that the existing system should be abandoned and a new method of treating the sewage resorted to, or they might order the sewers in a particular locality to be cut off from the general system, and thus create a far greater evil than that to be remedied, or they might order remedial works which might be entirely irreconcileable with the general system of the district. Indeed, there is no limit to the extravagance of the consequences that might flow from such a conflict of powers.

The very magnitude of the authority conferred upon justices by the sections under consideration affords a powerful argument that they are intended for the ordinary and comparatively simple cases comprised under the 91st section as we have interpreted it. These powers go far beyond those ever exercised by the Court of Chancery, which, with its successor, the Chancery Division, has never prescribed to a defendant against whom it granted an injunction the means by which a nuisance should be abated.

It is said that unless the provisions in question be applicable to such a case as the present, the local board of Plympton, or any local authority similarly circumstanced, will be powerless against foreign intruders in the shape of neighbouring local boards who have obtained powers to construct sewage works within the district which it is their duty to keep sweet and healthy. The objection is, as it seems to us, unfounded. Upon a proper case being made, the complaining local authority can obtain leave to file an information in the name of the Attorney-General, whilst every individual suffering legal injury from the nuisance may bring an action and apply for an injunction. Proceedings in the name and at the suit of a great public officer, who will not lightly interfere himself, or allow his name to be so used, are a much more appropriate remedy than summary proceedings before the justices at the mere will of a local board with whom, oftentimes, the mere fact of the intrusion of strangers into their district is a sore point.

We think, therefore, that the jurisdiction contended for is to be found neither in the spirit nor in the language of the enact-

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ments under consideration. The truth is that legislation with respect to public bodies, such as the local authorities under the Public Health Act, 1875, is largely founded on the assumption that they will honestly do all that they can to carry out in a proper fashion and with due regard to the rights of others the very important and difficult duties cast upon them. Impossibilities cannot be and are not expected of them. With respect to drainage, success was certain not always to attend their first efforts, and it would have been strange, indeed, if upon their first failure to establish a system which should have no weak point and create no nuisance anywhere, their charter, as it were, should be forfeited, and the views of two magistrates upon a difficult subject, with which they might be absolutely incompetent to deal, could be compulsorily substituted for plans upon which the defendant local authority might have spent hundreds of thousands of pounds.

We entertain no doubt that the present application for a certiorari must succeed, and that the order nisi must be made absolute with costs.

Order absolute.

Solicitors for applicants: *Torr & Co.*
Solicitors for respondents: *Busk & Co.*

J. R.

[IN THE COURT OF APPEAL.]

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Jan. 11;
Feb. 4.

STUMM *v.* DIXON & CO. AND KNIGHT.

Practice—Costs—Taxation—Joint Defendants in Action of Tort—Defendant severing in Pleading—Judgment against both Defendants with Costs—Liability of Defendants for Costs of Separate Pleading—Order LXV., *r.* 1.

In an action of tort against two defendants they pleaded jointly payment into court only. The plaintiff replied, denying the sufficiency of the payment. One of the defendants then obtained leave to amend his statement of defence, and added an alternative separate defence, denying any liability to the plaintiff. At the trial a verdict was found against both defendants for an amount beyond the sum paid into court, and judgment was entered for the plaintiff for that amount, with costs to be taxed:—

Held, by Lord Esher, M.R., affirming the judgment of the Queen's Bench Division, that the defendant who delivered the separate defence was alone liable for the costs occasioned to the plaintiff by and in consequence of the separate pleading, and that the other defendant was not liable for those costs.

By Fry, L.J., dissenting, that both defendants were jointly and severally liable for all the costs of the action.

APPEAL against a decision of a Divisional Court (Lord Coleridge, C.J., and Manisty, J.). (1)

The action was brought for a tort against two defendants, Dixon & Co. and Knight. At first the defendants pleaded jointly payment into court, and no other defence.

The plaintiff replied, denying the sufficiency of the payment.

Dixon & Co. afterwards obtained leave to amend their defence, and they then added as an alternative defence a denial of any liability to the plaintiff. The defendant Knight's defence was not altered.

The action was referred to an official referee for trial, and he found a verdict against both defendants for 130*l.* damages beyond the amount paid into court, and directed judgment to be entered for the plaintiff against both defendants for 130*l.* and costs.

Judgment was accordingly entered for 130*l.* and costs to be taxed. The master, on taxing the costs, held that Knight was not liable for the costs occasioned to the plaintiff by and in

(1) Ante, p. 99.

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consequence of Dixon & Co.'s amended pleading, but that Dixon & Co. were alone liable to pay those costs.

The Divisional Court affirmed the decision.

The plaintiff appealed.

Jan. 11. *Le Riche*, for the plaintiff. The settled practice is that, when there is one judgment against two defendants, it carries all the costs against them both. There is no apportionment of the costs: *Real and Personal Advance Company* v. *McCarthy* (1); *Lemaitre* v. *Davis* (2); *Twinberrow* v. *Braid* (3); *Poole* v. *Franks* (4); *Michel* v. *Bullen* (5); *Johnson* v. *Mills* (6); *Betts* v. *De Vitre* (7); *Heatley* v. *Newton*. (8)

J. G. Witt, for the defendant Knight. There is no authority directly in point, but, if the Court thinks this is a reasonable and just mode of taxing the costs, the onus is on those who assert that there is a rigid rule to the contrary. If the argument for the plaintiff is right, it would follow that, if the plaintiff in an action against two defendants was unsuccessful as against one of them, both defendants would be entitled to costs from the plaintiff. The order is manifestly just, and there is no practice to the contrary which binds this Court.

Le Riche, in reply.

Cur. adv. vult.

Feb. 4. LORD ESHER, M.R. (His Lordship stated the facts as above, and continued:—) The question is whether, when an action in respect of a wrongful act is brought against two defendants, and they both defend the action, but one of them (the other not being able to interfere with him in any way), puts a defence on the record wholly and solely on his own account—a defence which can have no effect whatever either in favour of or against the other defendant—and by so doing occasions costs to the plaintiff,—whether the plaintiff, under a judgment against both the defendants, can recover against the other defendant the costs thus occasioned by the act of the one defendant without the authority

(1) 18 Ch. D. 362, 368.
(2) 19 Ch. D. 281, 293.
(3) W. N. 1878, p. 169.
(4) 1 Molloy, 78.
(5) 6 Price, 87.
(6) Law Rep. 3 C. P. 22.
(7) 11 Jur. (N.S.) 9.
(8) 19 Ch. D. 326.

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of the other. I cannot help saying that to compel the other defendant to pay those costs would be absolutely contrary to natural justice. The question is, whether it is in accordance with the law. I think these two propositions may be laid down: (1) that, unless we are forced by paramount authority to hold that it is law, nothing which is contrary to natural justice can be part of the common law of England; (2) that no practice of the masters, however long established, however continuous, it may have been, is of any legal authority, or in any way binds the Court, unless it has been determined by the Court itself to be a right practice. The masters of the Court, however distinguished they may be, have no authority to determine the law. Their practice ought no doubt to be examined with the greatest care, but it is of no authority to bind the Court. Has, then, the practice as regards the point now raised ever been declared by the Court? Lord Coleridge, C.J., and Manisty, J., made inquiries and could not find that any universal practice had prevailed. We have put some questions to the masters, and we have had an interview with the senior master. I understand from him that the point has arisen so seldom that he cannot say that any universal practice has been established. But, even if it had, it would not, as I have already said, have any binding authority.

It is said, however, that an authority for the supposed practice is to be found in *Wilson* v. *Foore* (1). That seems to me an odd case. The statement is, "Each defendant is answerable for the whole costs; therefore, in an ejectment against several, where the defendants defended severally: at the assizes one confessed and had a verdict against him; and others did not confess; the Court upon application said the officer must tax the same costs against all the defendants. If after the plaintiff has had satisfaction against one, he should take it against another, such defendant may apply to the Court: *Wilson* v. *Foore*. (1)"

It may be that it could not be said that the costs incurred in that case by the one defendant could have no effect upon the other. I really do not know how that was. But the question of taxation of costs does not arise at the assizes. Whether the judgment in that case was a judgment in ejectment does not appear.

(1) Buller's Nisi Prius, 7th ed. p. 335 c.

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I think the case is very unsatisfactory, and it appears to me that that chapter in Mr. Justice Buller's book is a very unsatisfactory one. The learned judge seems to have inserted all the cases on the subject which he found in his note-book; there is no sifting of the cases and no expression of his own opinion. It is said that this statement has been transferred into the text-books, and so no doubt it has. I will refer to Chitty's Archbold's Practice, 12th ed., vol. i., p. 498, as a specimen of the way in which the case has been treated in text-books, and that shews, I think, how careful we ought to be in adopting statements in text-books. The case is to be found there under the heading "On verdict for defendants," whereas it was a case in which the verdict was against the defendants. The case is introduced into the middle of the chapter thus (speaking of actions ex delicto), "where there are several defendants who obtain judgment in the action, the plaintiff may pay costs to which of them he pleases; and, when they fail, each defendant is liable for the whole costs," reference being made to *Wilson* v. *Foore* (1), under the name of *Wilson* v. *Foote*. Why that case should be dragged in at this place I cannot conceive. It is put there without any comment whatever. The case is no doubt more fully considered in Gray on Costs. If this case is an authority in favour of making each defendant liable for all the costs, it is the only authority, and, if in principle I think it wrong, I shall not hesitate to say that I am not bound by it.

What is the importance of the question? In cases in the Chancery Division the judges mould their judgments as to costs so as to meet the circumstances of each particular case, and this can be done also in a common law action when it is tried by a judge without a jury. The matter is only important when a common law action is tried with a jury. In that case it is provided by rule 1 of Order LXV. that the costs are to follow the event, unless the judge or the Court "shall for good cause otherwise order;" and, if the practice is what it is said to be, the judge must in every case in which he thinks that a defendant ought not to be liable for the whole of the plaintiff's costs, say that good cause had been shewn why he should not. But the

(1) Buller's Nisi Prius, 7th ed. p. 335 c.

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common form of "judgment for plaintiff with costs" does not in the case of a single defendant mean that the defendant is to pay all the costs incurred by the plaintiff, or all the costs reasonably incurred by him. It means that the defendant is to pay all the costs caused to the plaintiff by the act of the defendant. It may be reasonable for the plaintiff to have five or six consultations with counsel, but he does not get the costs of them all from the defendant. That is the difference between costs as between party and party and costs as between solicitor and client. The meaning of the common form is, that the plaintiff is to recover the costs caused to him by the defendant. In the present case the defendant Knight has not caused to the plaintiff the costs which are now in question, and, if the plaintiff is to recover them against Knight, he will be recovering from him costs not caused by the act of Knight. Before the Judicature Acts the judgment in a common law action could not have been moulded to meet the facts of the particular case, and we must, therefore, ascertain what was the meaning of the common form of judgment. The judgment at the trial is only the nisi prius judgment; it is not the final judgment. When the costs have been taxed the amount of the taxed costs is inserted in the postea, and that is the final judgment. It would be contrary to principle and to natural justice that one man should be mulct for that which another man has done—e.g. if one defendant took out a commission to examine witnesses from which the other defendant could derive no advantage. I agree with the Divisional Court (who affirmed the Master's taxation) that the costs ought to be distinguished so that this frightful injustice need not be done, and I think there is an easy mode of distinguishing them, as the master has done. In my opinion the true rule is this: When an action is tried against two or more defendants, and any defendant separates in his defence, and the judgment is against all, the law is that each of them is liable for the damages awarded by the judgment, and each of them is liable to the plaintiff for all costs taxed on his behalf as properly incurred by him in the maintenance of his action, except as to costs caused to him by so much of the separate defence of any defendant as is, and can only be, a defence for that defendant as distinguished

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from other defendants. With regard to such costs so caused to the plaintiff, he is entitled by law to recover them against that defendant alone who has so caused him to incur them. In such case the taxation before the master should be one taxation, with all the parties present; there should be only one allocatur, but the master, on being satisfied that a part of the costs came within the rule above enunciated should mark them on the margin and on the postea accordingly. Then the plaintiff will be entitled to issue execution against either defendant for all the costs not so marked, but against the one defendant only who had caused to the plaintiff the costs so marked in the margin for those costs. There will be no difficulty in carrying out this rule. It leaves the matter to be determined by the master, who is the person best qualified to deal with it, and will save the judge from useless discussions. In my opinion the judgment of the Divisional Court ought to be affirmed.

FRY, L.J. The question which we have to determine is as to the effect of a judgment which the plaintiff has recovered in an action of tort against two defendants for 130*l.* damages, and costs to be taxed.

The question is—not what in natural justice would be the proper judgment against the defendants in respect of the costs of the action, but—what it is competent for the master to do in taxing the costs under a judgment in this form. Was he bound to give one allocatur for costs against both the defendants? or could he allocate three sums, one to be paid by Dixon & Co., one by Knight, and the third by Dixon & Co. and Knight jointly? In my opinion he must allocate one sum only against all the defendants. As a general rule I conceive that at law all the defendants to an action are jointly and severally liable for all costs awarded against the defendants, even though one defendant may have severed in his defence. This is distinctly stated to be the rule by Buller, J., in his Nisi Prius, and I think it is a correct statement of what the law has been. In saying this I do not found myself upon the practice in the master's office, for I agree with the Master of the Rolls that a mala praxis in that office would not bind us; and moreover, the response which we received to our inquiries of the

masters was not very clear. But, if any practice had existed of dividing costs, cases analogous to the present must have been of frequent occurrence, and neither the industry of counsel nor our own researches have brought to light such a case. The silence of the books I regard as very cogent evidence that no such practice as is now insisted on has been known at common law. Buller, J., illustrates his statement of the law by the case of an action of ejectment against several defendants, where the defendants defended severally, and the Court said that the officer must tax the same costs against all the defendants. That case is fully explained in Gray on Costs, at p. 201. The learned author says: "The reason of this is obvious enough; the declaration alleged a joint trespass and ejectment by all the defendants, and that allegation the defendant was obliged by the consent rule to admit. The only question at the trial was that of title, and if the plaintiff proved his title he obtained his verdict against all the defendants against whom anything was recovered, without having to prove a joint trespass and ejectment by all, that being admitted by the consent rule; and so, being entitled to judgment against all, each was liable on that judgment for the whole of the costs." In other words, the rule in that case arose from the joint trespass —that is the joint wrong—and there all the defendants were liable for the whole costs, though one might have caused more costs than the others. That this is a correct statement of the old law as to the costs of an action of ejectment, is, I think, confirmed by the provisions of the Common Law Procedure Act, 1852, as explained by *Johnson* v. *Mills*. (1) I cannot doubt that under the old law each defendant to an action of tort was liable for the whole costs of the action. So much for the state of things before the Judicature Acts. Since those Acts costs must be awarded in accordance with the Acts and the rules. By r. 1 of Order LXV., when an action is tried with a jury the costs are to follow the event, unless the Judge or the Court "shall for good cause otherwise order." In every other case the costs are in the discretion of the Court or judge. Suppose that an action for a tort against two defendants is tried with a jury, and the verdict and judgment is against both defendants for damages and costs, the "event"

(1) Law Rep. 3 C. P. 22.

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is the creation of a joint and several liability of the defendants for the damages, and, if the costs are to follow the "event" it results that the defendants must be jointly and severally liable for the costs also. That being the law, it is, in my judgment, not competent for the master, by an exercise of discretion, to destroy this right of the plaintiff, and to award the greater part of the costs against one defendant only, who may perhaps be insolvent, releasing a solvent defendant. Suppose, in the next place, that the action is tried by a judge without a jury, in whom is the discretion as to the costs vested? In the judge, not in the master. If natural justice requires that one defendant should not be liable for the costs occasioned solely by the act of the other defendant—and I agree with the Master of the Rolls on that point—justice will be done if the Court or judge be asked to do it, but it cannot be done by the master. In my opinion the effect of the rule which has been laid down by the Master of the Rolls would be to vest in the master a discretion which by virtue of the rule belongs only to the judge. For these reasons I am unable to concur in the judgment of the Master of the Rolls. But I need hardly add that in a matter of pure common law practice I differ from the Master of the Rolls and the Divisional Court with much diffidence.

Appeal dismissed without costs.

Solicitors: *C. T. Foster; Saunders, Hawksford, Bennett, & Co.*

W. L. C.

STEEDS AND ANOTHER *v.* STEEDS AND ANOTHER. 1889

Bond—Release—Accord and Satisfaction to one of two Obligees—Specialty Debt—Practice—Pleading. *Feb.* 4, 6.

To an action by two obligees of a common money bond the defendant pleaded accord and satisfaction by delivery of stock and goods to one of the plaintiffs.

Upon an application to strike out the defence as being no answer to the action :—

Held, that according to the rule in equity, which is now to prevail, accord and satisfaction must be taken to be an answer to an action for a specialty debt; but that according to equity joint creditors must, primâ facie, be taken to be interested as tenants in common and not as joint tenants, and that the defence was good only as concerned the claim of the plaintiff who was party to the accord and satisfaction; that it was therefore defective and should be amended.

APPEAL from chambers.

The plaintiffs sued the defendants upon a specially indorsed writ to recover 315*l.* 18*s.* 2*d.*, for principal and interest due upon a common money bond given by the defendants to the plaintiffs in the year 1869, and conditioned for the payment on demand of 300*l.* with interest. The defendant John Steeds pleaded that in 1872 he, in full satisfaction and discharge of all his liability and that of his co-defendant under the bond, handed over and transferred to one of the plaintiffs certain stock and goods which the said plaintiff accepted in full satisfaction and discharge of the bond. The defence of the defendant Beauchamp was that the accord and satisfaction pleaded by Steeds released him, as surety, from all liability under the bond. The plaintiffs took out a summons under Order XXV., r. 4, to have the whole of the defence struck out on the ground that it disclosed no reasonable answer or defence to the claim. The summons having been dismissed by the master and the judge in chambers, the plaintiffs appealed.

1889. Feb. 4. *J. G. Wood*, for the plaintiffs. Accord and satisfaction is not a good defence, either at law or in equity, to an action on a common money bond, where the liability arises upon the specialty itself and not upon some subsequent default. The dictum in Bullen and Leake's Precedents of Pleadings (4th ed.), vol. ii., at p. 89, that the common law doctrine that a contract by specialty could only be discharged by writing also under seal did not prevail in equity, and that a parol release or

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rescission of a specialty contract might be effectual in equity if founded upon a consideration, is inaccurate, and the cases there cited do not bear out the proposition. In cases like the present equity follows the law, unless something can be shewn which would make it inequitable in the particular case to enforce the liability at common law.

Secondly, assuming accord and satisfaction to be a good equitable defence in the case of a sole obligee, it is not a defence in the case of one of two obligees, for payment by way of accord and satisfaction to one of two joint creditors is not a discharge in equity. In *Matson* v. *Dennis* (1), where a mortgage contained a covenant to pay the money and also a charge upon the land in favour of two joint creditors, payment to one was held to operate as a discharge of the covenant but not of the charge on the land. The reason of the rule is that where money is advanced by two persons to a third they will be looked upon in equity as tenants in common and not as joint tenants of the debt and of any security given for it.

E. U. Bullen, for the defendants. Admitting that the defence is not good at law, it is good in equity; for wherever a debtor's position has been materially altered by anything which he has been induced by his creditor to do, equity will give relief. There may be a discharge by parol which will operate as a good discharge or release in equity of a specialty debt: *Webb* v. *Hewitt* (2); and a declaration of intention to release a debt, upon which the debtor acts, will amount to a release of the debt in equity: *Taylor* v. *Manners* (3); *Yeomans* v. *Williams.* (4) Accord and satisfaction made to a sole obligee being a good equitable defence to an action on the bond, it also affords a good defence when made to one of two or more obligees, for the demand is joint, and is put an end to at law by the satisfaction of one of the joint creditors: *Wallace* v. *Kelsall.* (5)

[He also cited *Nicholson* v. *Revill* (6); *Cross* v. *Sprigg* (7); Coke on Littleton, 232 a; Seton on Decrees, p. 817.]

(1) 10 Jur. (N.S.) 461; 12 W. R. 926.
(2) 3 K. & J. 438.
(3) Law Rep. 1 Ch. 48.
(4) Law Rep. 1 Eq. 184.
(5) 7 M. & W. 264.
(6) 4 A. & E. 675.
(7) 6 Hare, 552.

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J. G. Wood, in reply. The cases of *Webb* v. *Hewitt* (1) and *Yeoman* v. *Williams* (2) conclusively shew that there must be something beyond the mere circumstances which are here alleged to amount to an accord and satisfaction in order to induce equity to interfere.

Cur. adv. vult.

1889. Feb. 6. The judgment of the Court (Huddleston, B., and Wills, J.) was read by.

WILLS, J. The plaintiffs in this case sue for a sum of money alleged to be due for principal and interest on a bond made in their favour by the two defendants.

One of the defendants pleads that he delivered to one of the plaintiffs certain stock and goods which were given by him and accepted by the said plaintiff in satisfaction and discharge of the money due upon the bond. The other defendant pleads that he executed the bond as surety and was discharged by the transaction set up by the first defendant.

The plaintiffs apply to have this defence struck out, as being no answer to their claim. The same question arises as to both defendants, and is shortly whether in respect of a bond given by C. to A. and B., accord and satisfaction made by C. to A. after the cause of action had arisen, and accepted by A., is an answer to the claim of A. and B.

On behalf of the plaintiffs two objections are raised. 1. That in respect of a specialty debt, accord and satisfaction of the cause of action by the person or persons liable is no more an answer to the action in equity than it is at law. 2. That even if it would be so, were the bond made in favour of A. alone, accord and satisfaction with A. is no answer in equity to the action by A. and B.

It is clear that at law accord and satisfaction of a debt due upon a bond is no bar to the action. This is, however, purely the result of a technicality absolutely devoid of any particle of merits or justice, viz., that a contract under seal cannot be got rid of except by performance or by a contract also under seal; so that supposing it had really been the case that in satisfaction

(1) 3 K. & J. 438. (2) Law Rep. 1 Eq. 184.

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of an overdue bond for 1000*l.* the person liable had given property worth 2000*l.*, which had been accepted in discharge of the obligation, still at law the obligee of the bond might recover his 1000*l.* without returning the property.

One would have thought that if the Courts of Equity ever interfered at all to prevent a man from enforcing an unconscientious and dishonest demand to which there was no answer at law, they would perpetually restrain an action brought under the circumstances described. Mr. Wood, however, who is an equity lawyer, contended before us that this was a case in which equity would follow the law, and would refuse to interfere, and he laid great stress upon a case of *Webb* v. *Hewitt* (1), which he said established that proposition. We are glad to say that we are unable to agree with him, and that we think he has done injustice to a system of which one recommendation has been supposed to be that it was, sometimes at all events, competent to correct some of the worst and most odious technicalities of the common law. The case cited appears to us to lead to the opposite conclusion to that contended for, and we think it perfectly clear that the ratio decidendi of the learned Vice-Chancellor was, that when the plaintiff had accepted money's worth in place of money in discharge of the bond, the debt in equity was gone and there was an end of it.

Upon the first point, therefore, we are against Mr. Wood, and have no doubt that if payment to one of the plaintiffs would have been an answer, the delivery to him and acceptance by him of goods in satisfaction of the debt would be equally an answer.

But Mr. Wood is, we think, right in saying that, as the defence is an equitable one, it is equally necessary to establish that payment by C., the obligor, to A., the latter being joint obligee with B., would in equity be an answer to the claim by A. and B. on the bond. We cannot follow Mr. Bullen's argument that as equity would treat the satisfaction as equivalent to payment, having got so far, he is at liberty to discard any further reference to equity, and say that as at common law payment to or release by A. would prevent A. and B. from suing, he is now in a position to treat A. as having been paid, and say that as

(1) 3 K. & J. 438.

this is a common law action there is the equivalent to a common law defence. If he is obliged to resort to equity for his defence, he must take the equitable principles applicable to the circumstances in their entirety; and we must therefore inquire what is the rule in equity with respect to payment to one of two co-obligees or co-creditors.

The reason why the defence is a good one at law is that the two creditors are treated as having a joint interest in the debt, with its incident of survivorship, and the satisfaction to one of the parties of a joint demand due to himself and others puts an end to the joint demand, and he cannot afterwards, by joining the other parties with him as plaintiffs, recover the debt: nor can a right of action be supposed to exist which, if it existed, might survive to the very person who had already received full value: *Wallace* v. *Kelsall.* (1)

In equity, however, it would appear as if the general rule with regard to money lent by two persons to a third was that they will primâ facie be regarded as tenants in common, and not as joint tenants, both of the debt and of any security held for it: *Petty* v. *Styward* (2); *Rigden* v. *Vallier* (3), cited in the notes to *Lake* v. *Craddock.* (4) "Though they take a joint security," says Lord Alvanley, M.R., "each means to lend his own money and to take back his own": *Morley* v. *Bird.* (5) Where a mortgage debt has been paid to one of the mortgagees, accordingly, it was held that the land was not discharged, and that the concurrence of the other mortgagees was necessary to make a good title: *Matson* v. *Dennis.* (6) This is on the ground that the debt is held by the two in common and not jointly, and the principle seems to us equally applicable whether the debt is secured by a mortgage or is merely the subject of a personal contract. The principal right of a mortgagee is to the money, the estate in the land is only an accessory to that right.

It is obvious, however, that this proposition cannot be put higher than a presumption capable of being rebutted. If the money, supposing it to have been lent, were trust money, the

(1) 7 M. & W. 264.
(2) Eq. Ca. Abr. 290.
(3) 2 Ves. Sen. 258.
(4) 1 White & Tudor, 5th ed. 208.
(5) 3 Ves. 631.
(6) 10 Jur. (N.S.) 461; 12 W. R. 926.

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presumption of a tenancy in common on the part of the two trustees could not, as it seems to us, arise. Survivorship is essential for the purposes of trusts, and so there may be a variety of circumstances which may settle the question either one way or the other. In the present case we do not even know whether the bond was for money lent, or what was the groundwork of the obligation, and it is clear that if the presumption is that the interest in this obligation belonged in equal portions in severalty to the two plaintiffs, the plaintiff who was settled with by the accord and satisfaction has been paid his half, at all events, and it cannot be recovered again in this action.

We think, therefore, that we cannot strike out this defence as we are invited to do. It seems to us that it must be good for a part of the claim at all events. But we think the statement of defence defective, and that Mr. Bullen ought to amend by a further statement of the material facts, and our order is that the statement of defence be amended accordingly, and if that be not done within ten days, the plaintiff be at liberty to sign judgment for half the amount claimed. We trust that upon the amended pleading being delivered the plaintiffs will, if possible, meet it by any necessary addition to or correction of the facts alleged, and not repeat a motion of this kind, which asks the Court to do what is to the last degree unsatisfactory, give judgment for a defect of pleading and in ignorance of all the facts which ought to be known before the rights of the parties are definitely adjudicated upon. Both parties are partly responsible for the present motion and the costs of this appeal will be costs in the cause.

Order accordingly.

Solicitors for plaintiffs: *Helder & Roberts, for T. A. Hill, Paulton, Somerset.*

Solicitors for defendants: *Darley & Cumberland, for Clifton, Carter & Co., Bristol.*

W. J. B.

[IN THE COURT OF APPEAL.]

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Feb. 13.

AMON *v.* BOBBETT.

Practice—Costs—Costs of Counter-claim—Order LXV., *r.* 12.

Order LXV., r. 12, by which a plaintiff, who recovers a sum not exceeding 50*l.* in an action of contract, is entitled only to costs on the county court scale unless the Court or a judge otherwise orders, does not apply to the case of a counter-claim. Where therefore a plaintiff recovered 48*l.* on his claim, and also succeeded upon a counter-claim for 123*l.*:—

Held, that for the purposes of taxation the claim and counter-claim must be treated as independent actions; that the costs of the counter-claim followed the ordinary rule as to costs, and that the plaintiff was entitled to have the costs of his defence to the counter-claim taxed on the High Court scale.

APPEAL from a decision of the Queen's Bench Division. The plaintiff sued the defendant in the High Court to recover 48*l.* for goods sold and delivered. The claim was admitted on the pleadings by the defendant, who counter-claimed for 123*l.* for damages for the breach of an agreement. At the trial before a judge and jury a verdict was found for the plaintiff upon the defendant's counter-claim, and judgment was given for the plaintiff both upon the claim and the counter-claim. No application as to costs was made to the judge at the trial. Upon taxation of costs the plaintiff admitted that he was only entitled to costs on the county court scale in respect of his own claim of 48*l.* but claimed to be entitled to costs on the High Court scale in respect of his successful defence to the counter-claim. The master held that as the plaintiff had only recovered 48*l.* in the action he was, under Order LXV., r. 12, only entitled to costs on the county court scale both as regards the claim and counter-claim. A summons to review this taxation was referred by Denman, J., to the Divisional Court (Lord Coleridge, C.J., and Hawkins, J.), who, upon the authority of *Blake* v. *Appleyard* (1) and *Lewin* v. *Trimming* (2), affirmed the master's decision. The plaintiff appealed.

W. S. Robson, (*Bigham, Q.C.*, with him), for the plaintiff. The plaintiff is entitled to have the costs of his successful resistance to the counter-claim taxed on the High Court scale. It is true that a counter-claim is not in every respect an independent

(1) 3 Ex. D. 195 (2) 21 Q. B. D. 230.

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action, for it is not commenced by writ, but for many purposes, including taxation of costs, the claim and counter-claim must be treated as practically independent actions. In *Winterfield* v. *Bradnum* (1) it was held that where a defendant admitted the claim and set up a counter-claim involving a distinct cause of action, he was not entitled to security for costs from the plaintiff, a foreigner residing out of the jurisdiction. A defendant may by counter-claim raise causes of action which have arisen since the writ: *Beddall* v. *Maitland.* (2) In *McGowan* v. *Middleton* (3) a counter-claim was held to have an independent existence, so that it did not come to an end in consequence of the plaintiff discontinuing the action, and in *Andrew* v. *Aitken* (4) an order of revivor continuing the action was held not to operate so as to continue the counter-claim. These decisions proceeded upon the ground that counter-claims must be treated as being in the nature of independent cross actions, and they should be treated in the same way as regards taxation of costs. The Divisional Court considered that they were bound by *Lewin* v. *Trimming* (5), and *Blake* v. *Appleyard* (6), but those decisions are inapplicable to the present case.

[He also cited *Stooke* v. *Taylor* (7); *Baines* v. *Bromley.* (8)]

H. F. Dickens, for the defendant. The judgment of the Divisional Court is right. Primâ facie the plaintiff is within the operation of Order LXV., r. 12, for this is an action of contract in which he has recovered a sum not exceeding 50*l.* The trial of the claim and counter-claim form but one inquiry, which takes place in the plaintiff's action. If the plaintiff had brought his action in the county court the counter-claim could have been tried there, and he would only have been entitled to county court costs in respect of it; he cannot by choosing an improper forum for his action, entitle himself to costs on the High Court scale in respect of the counter-claim with which he is met. [He cited *Lund* v. *Campbell* (9); *Saner* v. *Bilton* (10); *Shrapnel* v. *Laing.* (11)]

(1) 3 Q. B. D. 324.
(2) 17 Ch. D. 174.
(3) 11 Q. B. D. 464.
(4) 21 Ch. D. 175.
(5) 21 Q. B. D. 230.
(6) 3 Ex. D. 195.
(7) 5 Q. B. D. 569.
(8) 6 Q. B. D. 691.
(9) 14 Q. B. D. 821.
(10) 11 Ch. D. 416.
(11) 20 Q. B. D. 334.

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LORD ESHER, M.R. The plaintiff in this case has brought an action of contract in the superior court, in which action he has recovered less than 50*l.* The defendant answered by a counter-claim for a distinct cause of action—a true counter-claim and not a mere set-off—in which he claimed upwards of 100*l.* To that counter-claim the plaintiff pleaded as though it were a distinct action, and upon the issues raised by it the plaintiff, who was defendant on the counter-claim, succeeded. Now that counter-claim was for an amount exceeding 100*l.*, and therefore, if it had been brought as a separate action, it must have been brought in the superior court; and had it been so brought as an independent action the defendant to such action would have been entitled to the costs of the action on the High Court scale. But it is said that because the plaintiff brought an action on contract and recovered less than 50*l.*, and was therefore only entitled in respect of that claim to county court costs, he was also only entitled to costs on the county court scale in respect of his successful defence to the counter-claim, which, if brought as a separate action, could only have been brought in the superior court. This is said to be the effect of Order LXV., r. 12. But does that rule apply to the case of a counter-claim properly so called? It is said that it does, because the counter-claim is in an action brought by the plaintiff. But the language of the rule shews that it would not be applicable, for it uses the expression "had he brought *his* action in a county court," which can only refer to a claim, and is not applicable to a counter-claim at all. Therefore the rule applies only to a claim, and the counter-claim is not affected by it, but comes under the ordinary rule as to costs. The claim and counter-claim then must, although they are included in one action, be treated for the purposes of taxation as separate actions, and, being so treated, the counter-claim cannot be within this rule.

Our decision only carries out what has been said in this court in many previous cases, and we will not go into a minute construction of these rules. For the purpose of taxation it has been laid down over and over again that in a case like the present the claim is to be taxed as though the plaintiff had recovered less than 50*l.*; it is to be taxed in the high court, but on the scale used

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in the county courts; but the counter-claim is to be treated as though it were a separate action, and as though it were an action properly brought in the superior court, and it must be taxed on the scale of allowance used in the high court. If a defendant succeeds on his counter-claim he is entitled to have the costs taxed on the High Court scale, and the allocatur will go for the difference. We are not over-ruling the Court below, which gave only a formal judgment, considering itself bound by two cases which were cited to it; I do not think, however, that they are in point, and if they are, I do not agree with them. The result is that this appeal must be allowed.

BOWEN, L.J. I am of the same opinion. The facts are simple. There was a claim for 48*l.*, which might have gone to the county court, but was brought in the superior court; the defendant had a counter-claim (a real counter-claim, not a set-off) in the nature of a cross-action for over 100*l.*, which, as a separate action, he could only have properly brought in the superior court. The plaintiff succeeded on his claim, in fact it was not disputed; the counter-claim failed; therefore the plaintiff succeeded both on the original claim and the counter-claim. Then arose the question of costs. The plaintiff admits that, having recovered only 48*l.* on his claim, he is touched by Order LXV., r. 12, and as regards his claim can only get costs on the county court scale. But the defendant seeks to go further, and says that as the plaintiff was suing in the high court for a sum which could have been recovered in the county court, he is only entitled to costs on the counter-claim on the county court scale, although that counter-claim was for a sum exceeding 100*l.*

We have a simple question to decide; whether a plaintiff, who recovers less than 50*l.* on his claim, and admits that in respect of it he is not entitled to costs on the High Court scale, and who also succeeds on a counter-claim, is to be limited as regards the counter-claim to county court costs. This question depends entirely on Order LXV., r. 12, upon which there are two opposite contentions. The plaintiff admits that the rule applies, but says that the counter-claim is not part of *his* action, and that the rule only cuts down the costs of *his* action. The defendant says that

the counter-claim is part of the litigation, and that the costs of the whole litigation are cut down by the rule when the plaintiff might have commenced proceedings in the county court. Which is the true construction? It is true that in many of the rules the counter-claim is spoken of as though it were part of the procedure in the plaintiff's action; but it has been held in many cases that for the purposes of taxation a counter-claim should be treated as though it were a cross-action. It is obvious that the view which is to be taken of a counter-claim must depend upon the particular rule in which it is dealt with; and if we find that the mixing up of the claim and counter-claim together (so to speak) would work injustice, then we must adopt the other view, and disconnect the counter-claim from the claim, so far as may be necessary for the purposes of justice. Here the plaintiff has, it is true, chosen the forum; but a plaintiff who has proved successful on a counter-claim can hardly suppose when he brings his action that a shadowy counter-claim is about to be waged against him; he is not responsible for its being set-up. As to the costs then which belong to the choice of forum (if I may so phrase it), the plaintiff can only get county court costs; but why should he only get county court costs on an issue for which he is not responsible, an issue which could not have been brought in the county court, and upon which he has proved successful? Why should his right to costs be so limited? To cut down the plaintiff's right to costs in this fashion would be to work injustice; and moreover the rule does not require that interpretation; it uses the word "entitled"; entitled where? It can only mean entitled "in his action," and the language of the remainder of the rule shews that these words should be read in in this place; the rule really deals with the costs appurtenant or appendant, so to speak, to the plaintiff's own action.

This case illustrates the rule in somewhat the same way as *McGowan* v. *Middleton* (1), in which the question was whether a plaintiff who was met by a counter-claim was at liberty by discontinuing his own claim to put an end to the counter-claim. Now if a counter-claim is to be treated as having no vitality except as a bar to the action, it becomes a defence and not a

(1) 11 Q. B. D. 464.

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counter-claim; but, as was said in that case, it is more than a defence, it is in the nature of a proceeding in a cross-action, and when necessary for the purposes of justice it must be so treated. A counter-claim is therefore to be treated, for all purposes for which justice requires it to be so treated, as an independent action, and it is necessary for justice to be done under Order LXV., r. 12, to consider it as not being part of the action, but as being disconnected from it. The question as to the costs of the counter-claim is therefore left at large, and unless otherwise ordered by the judge they follow the ordinary rule, and are to be taxed on the High Court scale.

FRY, L.J. I am of the same opinion. I cannot read the rule as intended to affect costs incurred by a party in the character of a respondent or defendant.

Appeal allowed.

Solicitors for plaintiff: *Wild & Collyer.*

Solicitors for defendant: *Collyer-Bristow & Co., for Stone, Simpson, & Son, Tunbridge Wells.*

W. J. B.

Jan. 30.

[IN THE COURT OF APPEAL.]

AXFORD *v.* REID.

Husband and Wife—Married Woman—Debt incurred by Wife before Marriage—Judgment against Wife—Separate Estate—Restraint on Anticipation—Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93), s. 12.

Sect. 12 of the Married Women's Property Act, 1870, which makes any property belonging to a married woman for her separate use liable to satisfy her debts contracted before marriage, extends to property settled to the separate use of a married woman without power of anticipation.

A husband and wife were sued in respect of debts of the wife contracted before their marriage, which took place after the coming into operation of the Married Women's Property Act, 1870, and before the coming into operation of the Married Women's Property Act, 1882, and judgment was recovered against them. The wife was possessed of property which upon her marriage was settled to her separate use without power of anticipation:—

Held, that the wife's property was liable to satisfy the judgment.

Sanger v. *Sanger* (Law Rep. 11 Eq. 470) approved.

APPEAL of the defendant, Anna Reid, a married woman, from the judgment of the Queen's Bench Division.

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The defendant and her husband were in 1881, during the operation of the Married Women's Property Act, 1870, jointly sued in respect of a debt of the wife contracted before her marriage in 1879, and, in default of defence, judgment was signed against both defendants personally for the debt and costs. The wife was entitled under the will of her first husband to the income of certain property for her life, which was upon her re-marriage settled to her separate use without power of anticipation. In December, 1888, the action having been revived, a receiver was appointed of the income of the defendant due and payable to her under the first husband's will. The defendant thereupon took out a summons to set aside the judgment, or to vary it by adding to it the words prescribed in *Scott* v. *Morley* (1), and to discharge the order appointing a receiver. The summons was dismissed by Mathew, J., whose decision was affirmed by the Divisional Court (Lord Coleridge, C.J., and Hawkins, J.).

The defendant appealed.

Cozens-Hardy, Q.C., and *Scarlett*, for the defendant. There are two objections to this judgment as it stands; it is wrong so far as it is a personal judgment against the wife, and it is wrong as affecting property subject to a restraint on anticipation. The question depends upon s. 12 of the Married Women's Property Act, 1870 (2), and the words "separate property" in that section must be limited to such separate property as is free from any restraint on anticipation; as the defendant was not shewn to be possessed of any such separate property, the judgment should be set aside, or at any rate varied by being drawn up in the form settled in *Scott* v. *Morley*. (1) The Divisional Court in refusing this application acted upon the authority of *Sanger* v. *Sanger* (3), where Lord Romilly held that s. 12 of the Act of 1870 extended to property settled to the separate use of a married woman

(1) 20 Q. B. D. 120.

(2) By s. 12 of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), "a husband shall not, by reason of any marriage which shall take place after this Act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts, as if she had continued unmarried."

(3) Law Rep. 11 Eq. 470.

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without power of anticipation, a decision that was followed by Bacon, V.C., in *London and Provincial Bank* v. *Bogle* (1), and by North, J., in *In re Hedgeley.* (2) But Lord Cairns in *Ex parte Holland, In re Heneage* (3), and James and Cotton, L.JJ., in *Ex parte Jones, In re Grissell* (4), use language which is inconsistent with those decisions, and they cannot be regarded as law. The proper form of judgment is settled in *Downe* v. *Fletcher* (5), which was a case under the Act of 1870, where it is laid down that it must follow the form settled by the Court of Appeal in *Scott* v. *Morley.* (6)

[LORD ESHER, M.R. Mathew, J., only says that the form may be adapted from that in *Scott* v. *Morley.* (6) I do not think the Court meant to put in the words "not subject to any restraint on anticipation," and by doing so to introduce into the Act of 1870 the limitations of s. 19 of the Act of 1882.]

At any rate, there should be inserted in the judgment a limitation of execution to the defendant's separate property.

Ashton, (*J. V. Austin*, with him), for the plaintiff, assented to the insertion in the judgment of a limitation of execution to the defendant's separate property, and was not called upon to argue.

LORD ESHER, M.R. This is an appeal from the refusal of a Divisional Court to set aside or vary a judgment signed against a married woman, the grounds of appeal being that the judgment should either be set aside, or else that it should be altered in the particular way suggested by the appeal, and that the receiver should be discharged. As it comes before us, the case is that of a married woman against whom an action is brought in respect of a debt incurred before marriage, her property having been at the time of her marriage settled to her separate use without power of anticipation. In the present case her property belonged to her before the marriage; it came to her under the will of a former husband; but this makes no difference, and the question for our determination is the same as if the property had been settled on her by her present husband, and had never been hers before.

(1) 7 Ch. D. 773.
(2) 34 Ch. D. 379.
(3) Law Rep. 9 Ch. 307.
(4) 12 Ch. D. 484.
(5) 21 Q. B. D. 11.
(6) 20 Q. B. D. 120.

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The objection that has been taken on her behalf is that, because her property was settled to her separate use without power of anticipation, judgment ought not to go against it, and that, as it is not shewn that she has any other property, there ought to be no judgment at all. It is further said that, if any judgment ought to be signed, it should be limited to property other than that settled to her separate use without power of anticipation, and that, as a necessary consequence of either view, the receiver should be discharged.

The question turns on the true construction of s. 12 of the Married Women's Property Act, 1870, and its application to such circumstances as those of this case, and we are concerned only with that part which enacts that the wife "shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy such debts," that is to say, debts contracted by her before marriage, "as if she had continued unmarried;" this is naturally divisible into two parts, that a wife shall be liable to be sued for her ante-nuptial debts, as if she had continued unmarried, and that property settled to her separate use shall be liable to satisfy such debts. It cannot be denied that the wife may be sued under this section, but under what circumstances can she be so sued? She can only be sued so as to make the judgment bind property belonging to her for her separate use; if she has none, she cannot be sued at all, for it is a necessary part of the cause of action to shew that she has it. If she has such property, is it true to say that no action will lie against her if that property is made not liable to anticipation? I think not. We are asked to put a limitation on the words "belonging to her for her separate use," and to add to them some such words as, "and not subject to any restraint upon anticipation." But we must apply the ordinary rule of construction, that the words are to be read in their ordinary sense, and in their full sense, unless there be something in the context to limit their meaning. What is there here in the context? I can see nothing in the context or the subject-matter of the section entitling this Court to act upon the suggestion to limit the ordinary meaning of the words. If that be so, we are not concerned with any general law, or any equitable or legal rights of the parties;

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everything depends upon the words of the Act of Parliament, and the right to bring an action against a married woman in respect of her ante-nuptial debts is a right which is absolutely at large if she has any property belonging to her for her separate use. That is the construction which I should put upon the section if I could derive no assistance from authority; but there is upon this very point the express decision of Lord Romilly in *Sanger* v. *Sanger* (1), who, as I read his judgment, clearly held that the words of the section were general, and that he could not limit them. It is worthy of consideration that the Married Women's Property Act, 1874, which dealt with the question of the ante-nuptial debts of a married woman, contains nothing which can alter or effect this interpretation of s. 12 of the Act of 1870, an interpretation which was also given to it by Bacon, V.C., in *London and Provincial Bank* v. *Bogle*. (2) It is said, however, that in subsequent cases a different view has been taken of the interpretation of the statute, and expressions of Lord Cairns and other learned judges have been quoted, not one of which, however, as it seems, assumed to affect or criticise the two previous judgments; those cases did not deal with this point, and are therefore no authorities. It is therefore not true to say that, if there is a restraint on anticipation, it prevents the section from applying; the section applies equally whether there be a restraint on anticipation or not. Are we, then, to put into the judgment the words of limitation asked for by the defendant limiting execution to her separate property not subject to any restraint on anticipation? We cannot do so, for no such restriction exists. At present the judgment stands without any words of restriction at all, and it is suggested that the Act of Parliament sufficiently defines the liability of a married woman so as to make it unnecessary to insert any restrictive words at all in the judgment. But this is not the right way to treat the question; the judgment ought to state clearly the result of law on the facts on which it is founded, and we ought to mould it into the form suggested by Mathew, J., in *Downe* v. *Fletcher*. (3) The judgment will, therefore, be adapted from that in *Scott* v. *Morley* (4),

(1) Law Rep. 11 Eq. 470.
(2) 7 Ch. D. 773.
(3) 21 Q. B. D. 11.
(4) 20 Q. B. D. 120.

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though the form there cannot be closely followed, as it was applicable to different circumstances and to a different state of the law. The judgment will be in this form:—It is adjudged that the plaintiff do recover the sum of £——, and costs, to be taxed against the defendant (the married woman), such sum and costs to be payable out of her separate property, whether subject to any restriction against anticipation or not, and not otherwise—

Subject to this variation, to which the plaintiff assents, the appeal must be dismissed—

FRY, L.J. We have to interpret s. 12 of the Married Women's Property Act, 1870, which took away the liability of a man in respect of the ante-nuptial debts of his wife, and made the wife to a certain extent liable to be sued in respect of them. The latter portion of the section may be analysed into two parts; that the wife shall be liable to be sued in respect of such debts as though she had continued unmarried, and that property belonging to her for her separate use shall be liable to satisfy them as if she had continued unmarried. No doubt the language is not perfectly accurate, for if she were unmarried she could not be said to have property belonging to her for her separate use, but the meaning of the section is reasonably plain. If a married woman has property belonging to her for her separate use, she is liable to have an execution issued against it as though she were a single woman; that is, she must be assumed to be a single woman in possession of that property. The real question is whether the words "any property" belonging to a woman for her separate use, apply only to such property as is free from any restraint on anticipation, or whether they include property subject to such restraint. It is known to every lawyer that a married woman's property is of two kinds, that which is free from, and that which is subject to, restraint on anticipation, and that by far the greater part of the property of married women is settled so as to be subject to the restraint. The legislature knew this also, and they must be taken to mean what they said in this section, that all the property of a married woman shall be liable to satisfy her ante-nuptial debts. If the section had meant

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that only one of these two classes of a married woman's property was to be liable to her ante-nuptial debts, it would say so in express terms, and it would not be a fair interpretation of the section to accede to the suggestion that its plain meaning should be so limited. That is how the matter stands on the statute alone apart from authority. There are in addition three cases in which the same view has been taken of the section, and in which the judgment has been entered in that form, and there has been no appeal from any of those decisions, though the statute was passed nearly twenty years ago. The observations which have been made by other judges on those cases do not appear to me inconsistent with the decisions. There seems to me therefore no doubt that, whether regard is had merely to the language of the statute or also to the authorities, the case is clear. I agree with the Master of the Rolls that we should modify the form of the judgment in the way he has suggested, but as that was not one of the contentions of the appellant the appeal must be dismissed.

BOWEN, L.J. I concur.

Appeal dismissed.

Solicitors for plaintiff: *Rowcliffes, Rawle, & Co., for Benson & Carpenter, Bristol.*

Solicitors for defendant: *Mear & Fowler.*

W. J. B.

[IN THE COURT OF APPEAL.]

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March 5.

THE EARL OF JERSEY *v.* THE GUARDIANS OF THE POOR OF THE NEATH POOR LAW UNION ACTING AS THE NEATH UNION RURAL SANITARY AUTHORITY.

Mines and Minerals—Reservation from Grant—Brick Earth and Clay—Destruction of Surface of Land.

A conveyance in fee of land reserved "all mines of coal culm iron and all other mines and minerals whatsoever except stone quarries," with power to work the same, and to make roads, watercourses, and other works, through, over, or upon the land, for the purpose of raising and carrying away the coal, culm, iron, or other minerals, provided that the surface or soil of the land should not be disturbed without the previous consent in writing of the grantee, his heirs or assigns, except only for the making, constructing, repairing, and using one road only, and one watercourse only, for all or any of the purposes aforesaid, the grantor, his heirs or assigns, doing as little damage as might be to the surface of the lands, and making compensation for all such damage. The defendants obtained from the owners of the land the right to put down a sewer which passed through a bed of brick earth and clay. The plaintiff, as owner of the reserved minerals, claimed compensation for the damage he had sustained and might sustain by reason of the acts of the defendants, and obtained an award in his favour under the Public Health Act, 1875. In an action on the award:—

Held, applying the rule of construction laid down in *Hext* v. *Gill* (Law Rep. 7 Ch. 699), that, there being nothing in the context to shew that the reservation should have a more limited meaning, it included brick earth and clay, which were substances which could be got from underneath the surface of the earth for the purpose of profit; that the plaintiff, therefore, was owner of the brick earth and clay, and was entitled to compensation.

APPEAL from the judgment of Day, J.

In the year 1829 certain lands in the parish of Llantwit, in the county of Glamorgan, were conveyed in fee to one Lewis Thomas, save and except "All mines of coal culm iron and all other mines and minerals whatsoever except stone quarries within or under the several lands lastly hereinbefore released and comprised in the second schedule with ample and sufficient powers for working the same and for making any roads watercourses or other works through over or upon the same lands or any part thereof for the purpose of raising and carrying away such coal culm iron or other minerals except as aforesaid or for working any other mines and carrying and conveying the produce thereof

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through or over the same lands or any part thereof and for digging and getting stone and other materials to be used in or about the said works or any of them Provided nevertheless that the surface or soil of the said lands or any of them shall not be disturbed without the previous consent in writing of the said Lewis Thomas his heirs or assigns first had and obtained except only for the making constructing repairing and using one road only and one watercourse only for all or any of the purposes aforesaid he the said John Wormald (the grantor) his heirs or assigns doing as little damage as may be to the surface of the same lands and making compensation to the said Lewis Thomas his heirs and assigns for all such damage the amount thereof to be settled by arbitrators to be named for that purpose in case the parties interested should differ about the same."

In 1885 the defendants, acting as the rural sanitary authority, obtained from the successors in title of Lewis Thomas a grant of the right to lay a line of main sewer pipes through a part of the land conveyed by the deed of 1829, and they accordingly executed the work, and removed in doing so a portion of a bed of brick earth and clay underlying the land, and immediately below the surface, and capable of being used for the manufacture of bricks, drain pipes, roof tiles, and earthenware. The plaintiff, as the successor in title of the grantor, claimed compensation by reason of the damage he had sustained or should sustain by reason of the making and maintaining of the drain and all works and things incidental thereto. Arbitrators and an umpire were thereupon appointed under the Public Health Act, 1875, the latter of whom made an award in favour of the plaintiff for 30*l.*

An action was brought on the award, in which judgment was given for the plaintiff.

The defendants appealed.

Jelf, Q.C., and *Balfour Brown, Q.C.* (*Denman Benson*, with them), for the defendants. It is contended that the clay through which these pipes are laid did not belong to the plaintiff, because it did not come within the exception of "mines and minerals" in the deed, and, therefore, the plaintiff was not entitled to any compensation. The clay lay close under the surface of the land,

and could not be worked without destruction of the surface, and the exception ought not to be construed so as to defeat the grant and render it illusory. The proviso in the deed against disturbance of the surface tends to shew that the exception cannot have been intended to include such a subject-matter as clay actually forming the surface of the land. The case of *Hext* v. *Gill* (1) proceeded on the assumption that china clay was a mineral within such an exception as this, and what was said as to the substances included in the term "mineral" must be considered as an obiter dictum. Moreover, doubt has been thrown on the accuracy of the definition in *Hext* v. *Gill* (1) by the case of the *Lord Provost of Glasgow* v. *Farie*. (2) They also cited *Church* v. *Inclosure Commissioners* (3) and *Loosemore* v. *Tiverton and North Devon Ry. Co.* (4)

Sir H. Davey, Q.C., and *H. D. Greene, Q.C.* (*John Henderson*, with them), for the plaintiff. The principle laid down in *Hext* v. *Gill* (1) governs the present case. The clay is a substance which can be got from underneath the surface of the earth for the purpose of profit, and the context, so far from shewing that a more limited meaning ought to be given to the word "minerals," shews by the provisions as to the destruction of the surface that such destruction was contemplated. The definition given in the judgment of Mellish, L.J., has not been affected by the judgments in the House of Lords in the *Lord Provost of Glasgow* v. *Farie* (2), and has the authority of a number of previous cases. They cited *Rosse* v. *Wainman* (5); *Bell* v. *Wilson* (6); *Midland Ry. Co.* v. *Checkley* (7); *Attorney-General for the Isle of Man* v. *Mylchreest* (8); *Midland Ry. Co.* v. *Haunchwood Brick and Tile Co.* (9); *Midland Ry. Co.* v. *Robinson.* (10)

Jelf, Q.C., in reply.

LORD ESHER, M.R. In this case there is an ordinary conveyance of land between two parties. It is not a conveyance of land which is sold under compulsion, nor under circumstances such

(1) Law Rep. 7 Ch. 699.
(2) 13 App. Cas. 657.
(3) 11 C. B. (N.S.) 664.
(4) 22 Ch. D. 25; 9 App. Cas. 480.
(5) 14 M. & W. 859.
(6) Law Rep. 1 Ch. 303.
(7) Law Rep. 4 Eq. 19.
(8) 4 App. Cas. 294.
(9) 20 Ch. D. 552.
(10) 37 Ch. D. 386.

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that one could say that the land was bought and sold to the knowledge of both parties for a particular purpose, as for instance building. It is an ordinary conveyance, and there is a reservation contained in it, and the question before us is, What is the true construction of that reservation? It was argued that, looking at the deed alone, it would shew that the matter in dispute was conveyed by the deed, and not included in the reservation. It was said, also, that the case of *Hext* v. *Gill* (1) had been overruled, and that the rule of construction there laid down had been pronounced by the judgments of the House of Lords in *Lord Provost of Glasgow* v. *Farie* (2) to be wrong, and that the matter in dispute was therefore not affected by the reservation. If that case has not been overruled, it is binding upon us, as it is a decision of the Court of Appeal.

I am inclined to think that the contention of the respondent in this case is correct, and that, even though the case of *Hext* v. *Gill* (1) were overruled, the subject-matter now in dispute is contained in the reservation. The conveyance is of all the lands, tenements, and hereditaments mentioned in the schedule, and if there were no reservation, that would carry all the minerals within the ambit; but then there is reserved "all mines of coal culm iron and all other mines and minerals whatsoever except stone quarries within or under the several lands lastly hereinbefore released and comprised in the second schedule." Now I cannot help thinking that should be read "all mines of coal culm iron and all other mines and all minerals whatsoever," for I do not think the word "other" can be applied to minerals. Then come the words "except stone quarries." Does not that shew that mines must be included which have to be worked by taking away the surface? A quarry is a thing which is worked in that way, and not by sinking a shaft, and the exception seems to me to shew that mines are contemplated which are worked by removing the surface. But we have here to construe the word "minerals" rather than "mines." Is the word "minerals," which comes after the word "mines," to be controlled by it? That was one of the matters which Mellish, L.J., discussed and ruled upon in *Hext* v. *Gill* (1), and I do not understand that it is disputed

(1) Law Rep. 7 Ch. 699. (2) 13 App. Cas. 657.

that on that point he was entirely right when he said that the authorities shew that the word "mines" coming before "minerals" does not restrict the sense of the latter. So that, on that generally accepted rule, and finding stone quarries specially mentioned, I cannot help thinking that "minerals" are not confined to such as can only be worked by going under the land. This is not a grant of the surface of the land as surface. The surface is included because it is a grant of the land, and it is not like the case where the surface is the material part of the grant. I desire to treat this case, not upon the footing of what would be the construction of the reservation if *Hext* v. *Gill* (1) were overruled, but applying the rule there laid down. Whether I can do so depends on whether *Hext* v. *Gill* (1) has been overruled. Now the words which the House of Lords were considering in the case of the *Lord Provost of Glasgow* v. *Farie* (2) were "mines of minerals," whereas the words here are "mines and minerals," and that case arose under the Waterworks Clauses Act and its application to Scotland. But supposing, which the Lord Chancellor says he does not mean, that the decision would govern the construction of the Waterworks Clauses Act or any similar Act in England, and supposing the words to have the same effect, still it seems to me that the case is not applicable to the present one, or to the case of *Hext* v. *Gill*. (1) It is consistent with the decision of the House of Lords that the rule laid down in *Hext* v. *Gill* (1) is an accurate one, because the case might have been determined as being within the rule, and none of the learned Lords in terms say that the decision in *Hext* v. *Gill* (1) was wrong, or that they would rule as a matter of judgment that it was wrong. If that is so, the case has not been overruled.

But then I mean to go further, and to express my opinion that *Hext* v. *Gill* (1) and the rule laid down in it are absolutely right. It was correctly said by Mellish, L.J., that the definition was not a new one, but the result of many previous cases. He stated that "the result of the authorities, without going through them, appears to be this: that a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in

(1) Law Rep. 7 Ch. 699. (2) 13 App. Cas. 657.

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the context or in the nature of the transaction to induce the Court to give a more limited meaning." The Lord Justice then reverted to the particular case before him, but the application of the rule is not the important matter. In my opinion the rule so laid down is an excellent rule of construction, founded on a long series of cases, and it would require a decision of the House of Lords to produce—I will not say conviction in my mind to the contrary, but—an authority which I should be bound to obey.

If that be the rule to be applied, I cannot doubt, after the evidence that was given before the learned judge, that the clay in this case can be worked for the purpose of profit, and is, in the general sense of the word, a mineral. Then is there anything in this case which enables one to say from the context or the nature of the transaction that the word "minerals" in this reservation should have a more limited meaning? Now when land is bought for the purposes of waterworks and making a reservoir, I think it might reasonably be said that there was something in the nature of the transaction to shew that the clay was to be used in carrying out the purpose of the Act or the conveyance, and could not have been intended to be reserved. The context here shews nothing of the sort. The argument that, because there was a conveyance of the land, that gave the purchaser the surface, and that if the surface is taken away he will not get what he bought, goes too far, and if admitted would shew that this reservation of minerals could never be applied to any conveyance of land. I am of opinion, therefore, that this case is governed by *Hext* v. *Gill* (1), that that case has never been overruled, and that on these grounds the appeal ought to be dismissed.

BOWEN, L.J. I think that this case is within *Hext* v. *Gill* (1), and that that case is not overruled or intended to be by the House of Lords, for reasons which I will give in a moment; but as *Hext* v. *Gill* (1) has been discussed, and has been supposed to be impeached, it becomes necessary, in my opinion, that we should give our views upon it. Speaking for myself, I am of opinion that the rule of construction there laid down with regard to ordinary reservations in ordinary grants is absolutely right. It is a

(1) Law Rep. 7 Ch. 699.

rule in the first place which seems to be intelligible on principle, because it arises out of the nature of the subject-matter of the transaction, which is a reservation out of a grant of land. There is in the first place a grant of the whole land, and out of it is reserved something which is called "minerals." Now the object of a reservation of that sort must be the severing of something from the land and the use of it afterwards for purposes distinct from those for which the rest of the land is used. The object is to treat differently from the rest of the land with respect to its enjoyment certain constituent parts of the earth which have, as Sir Horace Davey said, a use and value of their own independent of their being constituents of the soil. That indicates a line or limit down to which the definition of "minerals" may usefully extend and beyond which it ought not to be extended. It seems to me therefore that the rule laid down in *Hext* v. *Gill* (1) is a rule which arises directly from the character of the transaction, and is a sound rule of construction unless there is something in the context to throw light upon and alter it. But apart from that, it is the result of a long extent of authorities. I will not trace them, but only refer to the case of the *Midland Ry. Co.* v. *Checkley* (2), where Lord Romilly states, though not in better language, the same rule as that which was afterwards expounded by Mellish, L.J. Then comes *Hext* v. *Gill* (1), decided by Mellish, L.J., and James, L.J., than whom no greater authorities, I venture to say, have sat in our time in courts of law. The result of the authorities, as they say, is this, that a reservation of minerals includes every substance which can be got from under the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning. I will only add this further remark about that case, that the rule has been in existence for seventeen years and has produced a very great effect upon business transactions during that time, and I do not suppose it will be lightly disturbed or without grave consideration. It is to be observed that the rule admits, as every rule of construction of documents must admit, as it is after all but a working canon to enable us to arrive at the meaning of the particular document—

(1) Law Rep. 7 Ch. 699. (2) Law Rep. 4 Eq. 19.

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it admits of being modified by the contents of the document itself, and there are many classes of cases in which it is obvious that the rule would have to bend. Thus there are transactions in which the surface of the soil is dealt with as such, and in which it is intended to protect that which is dealt with to the extent which the legislature or the grantor has indicated. It is obvious that the case of *Lord Provost of Glasgow* v. *Farie* (1) is a case of that kind. It is a case in which consideration must be given to the special language of the legislature vesting specially defined interests in bodies which are the creation of the state, and giving them certain powers which are defined by the Act of Parliament, and which are apparent on comparison of the objects of the Act with the specific language of the sections. Such a case cannot, therefore, of itself destroy a canon of construction which has been laid down by Mellish, L.J., in the judgment which has been read. But, of course, the opinions of a Court constituted like the House of Lords, even if the decision is not absolutely in point, are matters to which we attend with the greatest possible respect. I would only say, with regard to Lord Halsbury's criticisms on *Hext* v. *Gill* (2), I cannot help thinking either that he has not been perfectly reported, or else the Lord Chancellor had not in his mind at the moment the exact canon of construction of Mellish, L.J., because Mellish, L.J., does not say, nor, I think, mean, that the test was whether the minerals could be worked at a market profit at the time, but whether they had a use and a value of their own independent of and separable from the rest of the soil. Lord Watson and Lord Macnaghten do not seem to me to reject *Hext* v. *Gill* (2), though I do not know how far either of them or both of them would in the first instance have come to the same conclusion. Lord Herschell, on the contrary, distinctly recognizes *Hext* v. *Gill* (2), and uses over again the exact language of Mellish, L.J., for I think it is obvious that the three lines which were cited in the argument from Lord Herschell's judgment are really an abbreviation of Lord Justice Mellish's words.

Then we come to the present deed. Is there anything in the present deed which makes a difference? It seems to me it cannot be said that the present deed is a mere grant of surface. It is

(1) 13 App. Cas. 657, at p. 685. (2) Law Rep. 7 Ch. 699.

true that the surface passes to the grantee with the rest of the soil, subject always to the exception; but it does not follow that if we give the construction to this deed which the respondent contends for that we defeat or destroy the grant. It is obvious from the fact, amongst others, that the proviso which follows, that the surface is not to be disturbed by surface operations without the leave of the grantee, protects his interest from being defeated by anything that is done. I also cannot help feeling that the exception upon the exception which is contained in the words "except stone quarries," shews that stone quarries would have been reserved under minerals unless the exception had been there. The words, "all mines and minerals whatsoever" are as large as they can be, and I do not think that they can be cut down by the previous words, "coal culm and iron." It seems to me, although that is a question of construction, that they are intended to be words which exclude the operation of the rule of construction of ejusdem generis. There is nothing in this deed inconsistent with the rule in *Hext* v. *Gill* (1), but I think if the deed stood alone I should come to exactly the same result.

FRY, L.J. I am entirely of the same opinion. It appears to me that the case of *Hext* v. *Gill* (1) is binding upon us unless it has been overruled by the House of Lords. It must be borne in mind that that case has, as has been already indicated, governed a large number of transactions, and has been followed in a large number of decisions; and it is further to be observed that the rule there laid down was the result of a series of earlier authorities which were carefully considered, and of which the effect was summarised in the judgments of the Lords Justices. Sir Horace Davey has called our attention to the case of *Earl of Rosse* v. *Wainman* (2), which was decided in the year 1845, in which substantially the same rule had previously been laid down. Therefore it appears to me that, looking merely at authority, we are plainly bound by the decision in *Hext* v. *Gill* (1) unless it has been overruled by the House of Lords. Before passing from it I desire to say that I, like the Master of the Rolls and the Lord Justice, accept the rule there laid down as good law, and I think,

(1) Law Rep. 7 Ch. 699. (2) 14 M. & W. 859.

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for the reasons that have been given by Bowen, L.J., that the reasonableness of that rule is apparent on consideration. A reservation of something out of the grant of land naturally must relate to something that is capable of being used independently of the land, and it is difficult, if not impossible, to find any other limit which you are to place upon such a reservation. I think therefore that the rule laid down is one binding upon us both in reason and on authority.

Then it is said it has been overruled by the decision in the House of Lords. I do not think that is so. It is true that the Lord Chancellor said that he would have preferred to introduce the rule and the principle of decision which was pointed out by James, L.J., and deliberately rejected by the Lord Justice, as one to which he could not give effect, although he preferred it. That suggested rule was to this effect. Consideration should be had to what the words meant in the vernacular of the mining world, the commercial world and the landowners at the time they were used in the instrument. The Lord Chancellor suggested that the rule would remove all difficulties. For my own part, if it be open to me to make an observation upon it, I doubt whether it would not be found to introduce into the construction both of ancient and modern documents a very considerable difficulty, requiring the consideration of the meaning of the words, not only in the English language as commonly used, but in the vernacular of three classes of persons. But upon that I say nothing more. The speeches of Lord Watson and Lord Macnaghten appear to me to leave the case of *Hext* v. *Gill* (1) untouched; whereas the speech of Lord Herschell clearly adopts it as the principle of his decision. Now I think that the question which was really before the House of Lords in the case of the *Lord Provost of Glasgow* v. *Farie* (2) was this: was there anything in the nature of the transaction there which prevented the application of the primâ facie meaning of the words? I think some of the learned Lords came to this conclusion, that in the construction of a statutory enactment intended to regulate the relative rights of a body of persons purchasing an interest in land for the purpose of constructing works, and the previous

(1) Law Rep. 7 Ch. 699. (2) 13 App. Cas. 657.

owner, it is reasonable to anticipate that the purchasers would acquire such an interest in the surface as would enable the works to be constructed and maintained by the purchasers. That was a circumstance modifying the operation of the primâ facie rule in *Hext* v. *Gill* (1). The inquiry, therefore, in the present case is this. Is there anything in the present instrument, in the words used, in the nature of the transaction, or the object of the contracting parties, to exclude the primâ facie meaning of the words "mines and minerals"? Now it has been forcibly pressed upon us that to give the words "mines and minerals" such a meaning as applies to surface clay, would be to deprive the purchaser of the use of the surface of the land. But I am of opinion that that contention is erroneous, and for this reason: that although I hold that the words "mines and minerals" or the word "minerals" alone did reserve an interest in this clay to the original owner, yet it appears to me to be equally clear that the provision which follows prevents the surface or the soil of the lands being disturbed without the previous consent in writing of the purchaser except for certain defined purposes. Therefore it would seem that the contracting parties foresaw that the effect of the reservation if it remained alone might be to injure the enjoyment of the land to a greater extent than the contracting parties intended, and they prevented the disturbance of the surface, without the consent of the purchaser of the land, except for certain defined purposes, and further stipulated that persons claiming under the reservation should make compensation to persons who claim under the grant. We have, therefore, in that circumstance a consideration of the rights and interest of the parties, which might be otherwise conflicting, which deprives Mr. Jelf's argument of its whole force. There is only one other point which has been urged upon us to which I need refer. We have been asked to apply what is called the doctrine of ejusdem generis, and to hold that the word "minerals" must have a restricted signification. Now the words of reservation are these: "All mines of coal culm iron and all other mines and minerals whatsoever except stone quarries." Now in the first place I think that the words "all other mines and minerals what-

(1) Law Rep. 7 Ch. 699.

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soever" are intended to mean that which they express, and where you find the word "whatsoever" following, as it does, upon certain substantives, it is often intended to repel, and in this case does effectually repel, the implication of the so-called doctrine of ejusdem generis, which, I think, has often been urged for the sake of giving not the true effect to the contracts of parties, but a narrower effect than they were intended to have. But further than that, it is to be observed that there is an exception to these general words, an exception, namely, of stone quarries, which is useful in shewing the generality with which the previous words had been used. It prevents any idea that the word "minerals" could be confined to anything like coal, culm, or iron, that is to say, to metalliferous minerals, which, I suppose, is the only argument which could be based on the doctrine of ejusdem generis; the exception tends to shew that, but for the exception, stone, not being metalliferous, would be included in the reservation. Therefore, taking the instrument alone, and even if the rule had not been so clearly laid down as it is in *Hext* v. *Gill* (1), I should have come to the same conclusion, and by the light of that case, I entertain no doubt as to the decision of this.

Appeal dismissed.

Solicitors for plaintiff: *Freshfields & Williams.*

Solicitors for defendants: *Bell, Brodrick, & Gray, for Howel Cuthbertson, Neath.*

(1) Law Rep. 7 Ch. 699.

A. M.

[IN THE COURT OF APPEAL.]

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March 21.

BROCKWELL *v.* BULLOCK.

Lunatic—Lunacy Regulation Act, 1862 (25 & 26 *Vict. c.* 86), *s.* 11—*Costs—Charges of Witness engaged on behalf of alleged Lunatic at Inquiry under the Act—Action against Lunatic not taken away.*

Sect. 11 of the Lunacy Regulation Act, 1862, in substance provides that it shall be lawful for the Lord Chancellor to order the costs, charges, and expenses of and incidental to the presentation of a petition for a commission in the nature of a writ de lunatico inquirendo, or for any order of inquiry under the Lunacy Regulation Act, 1853, and to the prosecution of any inquiry on such commission or order, to be paid either by the party who has presented the petition, or by the party opposing it, or out of the estate of the alleged lunatic, or partly in one way and partly in another; and that such order shall have the effect of an order for the payment of money made by the Court of Chancery.

An inquiry having been ordered under the Lunacy Regulation Acts whether or not the defendant was of unsound mind, the plaintiff, a medical man, was employed by the defendant's solicitor to examine the defendant, for the purpose of giving evidence of his sanity at the inquiry. The plaintiff accordingly did so, and attended and gave evidence at the inquiry, but notwithstanding such evidence the defendant was found to be a lunatic. The plaintiff subsequently brought an action in the county court against the defendant for his charges in respect of the services so rendered by him, but was nonsuited on the ground that he could not recover such charges without an order under the above-mentioned section :—

Held, that the section did not take away or affect the plaintiff's right of action, assuming the action to be in other respects maintainable, and therefore that the nonsuit was wrong and there must be a new trial.

APPEAL from the order of the Queen's Bench Division dismissing an appeal from a county court.

The action had been brought in the county court by the plaintiff, a medical man, against the defendant Bullock, who had been declared by inquisition a lunatic, and his committee, to recover the plaintiff's charges for services rendered to the defendant Bullock under the following circumstances. It appeared that a petition had been presented to the Lord Chancellor for an inquiry in lunacy under the Lunacy Regulation Acts as to the sanity of the defendant Bullock, and an inquiry was ordered on such petition. The solicitor acting in the matter of the petition for the defendant, the alleged lunatic, employed the plaintiff to

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examine him with a view to giving evidence of his sanity at the inquiry. The plaintiff accordingly examined the defendant Bullock, and made a report; and he afterwards attended and gave evidence at the inquiry. The defendant Bullock, however, notwithstanding his evidence, was found by the jury at the inquiry to be a lunatic at the time of such inquiry. The plaintiff's charges for such examination, &c., not being paid, he subsequently brought the action to recover them. It appeared that prior to the inquiry an order in lunacy had been obtained authorizing the drawing of a cheque by Bullock for £200 in favour of his solicitor to be applied towards the expenses incurred on behalf of Bullock in respect of the inquiry. When the case came on for trial in the county court it was objected on behalf of the defendants that the action was not maintainable without an order obtained under s. 11 of the Lunacy Regulation Act, 1862 (25 & 26 Vict. c. 86). (1) The county court judge held the objection good and nonsuited the plaintiff without going further into the case. On appeal to the Queen's Bench Division the Divisional Court was equally divided, Lord Coleridge, C.J., thinking, though with considerable doubt, that the county court judge was right, but Grantham, J., being of the opposite opinion. The dissentient judge withdrawing his judgment according to the ordinary practice, the appeal was dismissed, leave to appeal being given.

Channell, Q.C., and *Lindon*, for the plaintiff. Previously to the Act of 1862 such an action as this would have been maintainable against the lunatic. A lunatic is liable in contract for

(1) That section provides that "it shall be lawful for the Lord Chancellor intrusted as aforesaid to order the costs, charges, and expenses of and incidental to the presentation of any petition for a commission in the nature of a writ de lunatico inquirendo, or for any order of inquiry under the Lunacy Regulation Act, 1853, and of and incidental to the prosecution of any inquiry, inquisition, issue, traverse, or other proceeding consequent upon such commission or order, to be paid either by the party or parties who shall have presented such petition or by the party or parties opposing such petition, or out of the estate of the alleged lunatic, or partly in one way and partly in another, as the Lord Chancellor intrusted as aforesaid shall in each case think proper; and such order shall have the same force and effect as orders for the payment of money made by the High Court of Chancery in cases within its jurisdiction."

necessaries: *Read* v. *Legard* (1); *Stedman* v. *Hart* (2); *Wentworth* v. *Tubb* (3); *Williams* v. *Wentworth*. (4) The services rendered to the defendant Bullock by the plaintiff as a medical man were necessaries. It would, of course, be a question for trial whether there was a contract, and, if so, whether the services were under the circumstances necessaries; but the county court judge did not inquire into these questions, but stopped the case on the ground that there must be an order under s. 11 of the Lunacy Regulation Act, 1862, and that therefore the action was not maintainable. Sect. 11 is only a section giving to the Lord Chancellor a discretionary power over the costs of the inquiry, analogous to the power in many cases given to a judge or the Court in an action or other proceeding; the power so given only applies to the costs as between the parties. The section does not mean that an order may be made for payment of costs direct to witnesses. They look for payment to the respective parties who employ them. If the section applies as suggested in the case of the witnesses for the lunatic, it must also apply in the case of the witnesses for the petitioner. Surely it cannot have been intended that the medical witnesses employed by the petitioner should be deprived of their right of action against the petitioner. The section is only an enabling section and the order may be refused. A mere witness has no locus standi to apply under it for an order: *In re Townshend.* (5)

Bosanquet, Q.C., and *Cecil M. Chapman*, for the defendants. The question involved in this case, which is one of some importance, is whether the costs of medical witnesses alleged to be chargeable on the lunatic's estate are to be brought in before the master in lunacy as a matter incidental to the inquiry, or each medical witness, that may have been engaged, is to be settled with for his services as an independent matter between himself and the lunatic, or his committee as representing his estate; in which case it would be very difficult to resist payment in any particular case, though excessive liability had been incurred for medical expenses by the engagement of too many

(1) 6 Exch. 636.
(2) Kay 607.
(3) 1 Y. & C. 171; 2 Y. & C. 536.
(4) 5 Beav. 325.
(5) 2 De G. J. & S. 519.

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medical men. The 11th section is not dealing with a matter analogous to the costs of an action. It is dealing with the costs and expenses incidental to an inquiry ordered by the Court having jurisdiction in lunacy for the information of such Court. Everything done upon and incidental to the inquiry must be considered as done under the order of the Court directing the inquiry. The plaintiff's charges are therefore in respect of services rendered in the course of an inquiry ordered by the Court; and it is the reasonable construction of the legislation that the meaning is that all such charges and expenses shall be entirely in the discretion and subject to the order of the Court directing such inquiry. Such Court had jurisdiction to restrain such an action as this before the Act. In the case of *In re Weaver* (1) the action was restrained. The plaintiff is in substance endeavouring to recover these charges, which are certainly incidental to the inquiry, out of the lunatic's estate; and when a section provides that the Lord Chancellor may order such charges to be paid out of the estate, it must by implication mean that without such order they cannot be so recovered. They also cited *Beall* v. *Smith* (2); *In re Meares.* (3)

Channell, Q.C., was not called on to reply.

LORD ESHER, M.R. The plaintiff, who is a medical man, but not a physician, brought an action against the defendant Bullock, who is now a lunatic, in respect of services which he was engaged to perform by the defendant's solicitor, such services being really an examination of the defendant for the purpose of enabling the plaintiff to give evidence as a witness on an inquiry ordered under the Lunacy Acts, to ascertain whether the defendant was or was not a lunatic. The inquiry was held, and the plaintiff gave evidence on such inquiry to the effect that the defendant was not a lunatic, but his view was not accepted, and on the inquisition it was found that, at the time of the making of the inquiry, the defendant was a lunatic. A committee having been appointed in due course, he has been made a party to the action as a defendant, but only as such committee,

(1) 2 My. & Cr. 441. (2) Law Rep. 9 Ch. 85.
(3) 10 Ch. D. 552.

and there is no question of any personal liability on his part. The action was tried in the county court, and, it being shewn that the defendant Bullock was at the time a lunatic so found by inquisition, the objection was taken before the county court judge that, that being so, the action could not be maintained. The objection was put in the form that the action could not be maintained in the absence of an order under s. 11 of the Act of 1862: but it seems to me that the objection really involves the proposition that the action could not be maintained at all, and that the only remedy is by getting an order from what I will call the lunacy court under the section that the plaintiff's charges should be paid out of the estate of the lunatic. The county court judge accepted that contention, and acted on it forthwith. He did not enter into the inquiry whether the defendant Bullock was a lunatic at the time when the plaintiff was employed by his solicitor, a material question, though the answer to it may not admit of much doubt, nor did he go into the inquiry whether, if he were a lunatic at that time, the employment of the plaintiff was a necessary, so that, even if he were then a lunatic, the defendant might be bound as on a contract implied by law to pay for the services rendered by the plaintiff. Under these circumstances, the only question for us seems to be whether, assuming that the defendant was not a lunatic at the time of the plaintiff's employment, or that such employment of the plaintiff was a necessary, the action might be maintained. It seems to me that, before the statute to which we have been referred, the action might in either of these cases have been maintainable. Therefore, the question comes to be whether the 11th section takes away a right of action which would otherwise have existed and replaces it by a particular remedy given by the section. Unless it does so, the section may give a cumulative and independent remedy, but it leaves the former right still existing. Does the section in terms say that the right of action which would otherwise have existed shall be taken away? It does not. Then does it say so by necessary implication? Where are the grounds for such implication? As has been pointed out, the section enables, but does not oblige, the Lord Chancellor to make the order under it. It also would appear that a person in the position of the plaintiff

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could not be heard under the section before the Lord Chancellor to support his claim. Under these circumstances, can it be contended that by necessary implication the section takes away the previous right of action, or is it not only an enabling section, which may give another and cumulative mode of dealing with these charges, but does not destroy the right which previously existed? I think it was not disputed that, if the committee were willing to apply for that purpose under the section, an order might be made which would have the effect of giving the plaintiff the amount he claims out of the lunatic's estate, so in this sense a cumulative remedy may be said to be given by the section. But it seems to me that, whether the committee is willing to proceed under the section or not, the plaintiff is not prevented from bringing his action. All we decide, however, is that the county court judge was wrong in stopping the case. I express no opinion whether the plaintiff will ultimately succeed in the action. If it be shewn that the defendant Bullock was a lunatic when the plaintiff was employed, then I think that in order to succeed the plaintiff must shew that his employment was a necessary, a matter which may give rise to difficult questions. It may be a question whether, if the lunatic's solicitor had funds in hand at the time, it was necessary to employ the plaintiff on the defendant's credit; and there may be a question as to whether more medical men were employed than was reasonably necessary. I do not say at all how these questions may be solved. The conclusion I come to, after hearing the arguments, which were probably much more exhaustive here than in the Divisional Court, is that the 11th section has not the effect contended for by the defendants; that the appeal must therefore be allowed, and the case sent down again for a new trial.

FRY, L.J. I am of the same opinion. It is not necessary now to determine whether or not the action will ultimately prove to be maintainable. All we have to determine is whether the existence of the 11th section of the Act of 1862 takes away a right of action which, but for that section, would have existed. It was urged by the defendants' counsel that the terms of that section either make an order under it a condition precedent to

such an action as this, or prevent such an action from being brought at all. It will be convenient in the first instance to consider how the law stood when the Act was passed. It has been suggested that a power existed in the Lord Chancellor previously to the Act to restrain any action against a lunatic or his committee. I apprehend that there was no general jurisdiction of the kind suggested, and that a person, who had a common law demand against the lunatic, which was not satisfied in due course, might maintain his right by action at law without being liable to be restrained: and similarly a person who had an equitable demand against such lunatic might maintain a bill in equity. It is true that in certain exceptional instances the Lord Chancellor had interfered with actions in lunacy cases. These, however, were particular and special cases. One for instance, *In re Weaver* (1), was where an auctioneer who had acted in the sale of the lunatic's property under a decree in lunacy had brought in a bill of charges which was submitted to the taxing master, and then, finding that matters were going against him before the master, sought to maintain an action at law. In that case the Court restrained the action. It is not necessary to go through all the cases on the subject. It is sufficient to say that they do not in my opinion establish the existence of any general jurisdiction to restrain actions such as has been suggested. There is another observation which I desire to make as to the state of the law before the Act of 1862. In my judgment there was no right on the part of a creditor of the lunatic to apply to the Lord Chancellor for the payment of his debt, though it may be true that as amicus curiæ such a creditor would be listened to, if he could shew that the committee was abusing his office. The point was decided in the case of *In re Townshend.* (2) In that case a petition was presented by a medical gentleman, in whose care a lunatic had been placed, for payment out of the estate of an amount claimed to be due to him in respect of such maintenance. As soon as the petition was opened Turner, L.J., asked whether there was any precedent for such a petition, the usual course being for the claims of persons with whom lunatics had been placed to be settled between them and the committee: and the

(1) 2 My. & Cr. 441. (2) 2 De G. J. & S. 519.

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Court refused to make any order on the application of the petitioner. Knight Bruce, L.J., said: "I do not think an order for ascertaining the amount of the petitioner's claim and paying it out of the estate can be made on his application. It would, however, be advantageous to avoid the necessity for an action, and, if the committee who appears on this petition will by his counsel apply for such an order, I think that we may make it." Accordingly an order was made on the application of the counsel for the committee, the counsel who appeared for the Crown not opposing. That is a very instructive case with regard to the matters which have been discussed in the present case. It shews first the great care which the Court took not to allow any precedent to be created for such an application on the part of the creditor; and secondly, it shews that the Lords Justices undoubtedly considered that, if the matter were not settled by consent in the manner in which it was, the petitioner might bring his action. That case was not, it is true, decided until 1865, but it shews what the law was before. The law being such as I have stated, then comes the Act of 1862. I have no doubt that the real cause of the insertion of the 11th section was that doubts had arisen in various cases, e.g., *In re Windham* (1), whether the Court had jurisdiction to order payment of costs by a person who had improperly presented a petition for a lunacy inquiry. That being so the matter was set at rest by the legislature, and it is provided that the Lord Chancellor may order the costs, charges and expenses of and incidental to the presentation of the petition and the inquiry to be paid either by the petitioner or the party opposing the petition, or out of the estate of the alleged lunatic. It is to be observed in the first place that this is a permissive and enabling section, and that it does not oblige the Lord Chancellor to make an order. It is a matter of discretion whether he will make it or not, and the discretion so to be exercised is apparently to be exercised in the absence of any person claiming to be a creditor in respect of such costs and charges. Such a creditor is not only not called on to attend on any application for an order, but it would seem that in a general way he could not be heard if he did attend; and therefore a person in the

(1) 31 L. J. (Ch.) 720.

position of the plaintiff would have no opportunity of bringing any claim before the Lord Chancellor, when he exercises his discretion under the section. Parliament is no doubt omnipotent, but it would be a very unusual mode of legislation to make the right of a person contingent on an order in reference to which he cannot be heard. The next observation is that there are no words taking away the right of the creditor to sue. When one refers to other cases where Acts have created a Court of administration, or given powers of administration to an existing Court, and where it was intended that under such legislation the only remedy in respect of any claim should be in such court, one finds that the way in which that object has been effected is by expressly declaring that such Court may restrain any action or other proceeding taken in any other court; as for instance in the familiar case of a winding-up under the Companies Act, 1862, where the Court having control of the winding-up is empowered to restrain any proceedings taken elsewhere. There is nothing of that sort in this Act. There is this further consideration, which is to my mind equally important, viz., that there are no words giving either expressly or by implication any right to a person in the position of the plaintiff to apply to any Court having jurisdiction in lunacy matters. Therefore in regard to lunacy procedure he is left in the same position as he was before the Act. If the contention for the defendants were right, the result would be that the previously existing right of action would be taken away, and no right given to the creditor to make any application to the Court having jurisdiction in lunacy matters. Any right he would have would be subject to the condition precedent that an order should be made, application for which he could not make, and upon which he could not be heard. The previously existing right of action would therefore be turned into a mere chance that some proceedings might be taken by somebody else in which he could have no part. It was suggested that he might be heard in the character of amicus curiæ, but I think it would require very strong words to take away a right of action without giving any more specific remedy than that by way of substitute. I have only one other observation to make. The section gives to the Lord Chancellor power

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to make an order for costs against one of two parties, or out of one fund. The order may be for payment of the costs by the petitioner, or by the party who opposes the petition, or out of the lunatic's estate. Can it be contended that the effect is to make such an order a condition precedent to, or to destroy, the right which a person might otherwise have by contract against the petitioner or person opposing the petition? If not, how can the section have the effect of taking away or interfering with such a right as against the lunatic? It does not seem to me at all probable that such a result as the contention for the defendants would involve can have been intended. For these reasons I am of opinion that the section cannot receive the construction contended for, and the appeal must be allowed.

LOPES, L.J. I am of the same opinion. Before the Act of 1862 such an action as this might have been maintained, and the question therefore which we have to decide is whether s. 11 of that Act has taken away the right of action. I do not think that it has. The case of *In re Townshend* (1) is an authority to shew that a person in the position of the plaintiff would have no locus standi by himself and without the intervention of the committee to apply to the Court having jurisdiction in lunacy in such a matter. That being so, if, under the circumstances that exist in this case, we held that the right of action has been taken away, we should be depriving the plaintiff of his alleged debt without an opportunity of being heard. I think, if the legislature had intended that such should be the law, they would have used express words to that effect. I can find no such words in the section, nor do I find any words from which such an intention can be implied. The true construction of the section appears to me to be that it is permissive not imperative, and, though it may give a concurrent remedy, it does not destroy the right of action. For these reasons I agree that the appeal should be allowed, and a new trial ordered.

Appeal allowed.

Solicitor for plaintiff: *H. S. Holt.*

Solicitor for defendants: *The Official Solicitor.*

(1) 2 De G. J. & S. 519.

E. L.

[IN THE COURT OF APPEAL.]

1889
March 14.

RHODES *v.* SWITHENBANK.

Infant—Next Friend—Conduct of Cause—Compromise—Benefit of Infant.

The plaintiff, an infant, brought an action by her next friend in the county court to recover damages for personal injuries sustained by her through the alleged negligence of the defendant. At the trial a judgment of nonsuit was pronounced, and it was suggested that if there was no appeal the defendant would not ask for costs. The plaintiff's counsel agreed to this, and the judgment was entered without costs. The plaintiff was without means. On an application on her behalf for a new trial:—

Held (reversing the judgment of the Queen's Bench Division), that the agreement was of no benefit to the infant, and was not binding on her.

APPEAL from a judgment of the Queen's Bench Division.

The action was brought in the County Court of Leeds by a girl under sixteen years of age, suing by her next friend, in respect of injuries sustained by her through the alleged negligence of the defendant, her employer. The plaintiff was nonsuited, and it was suggested that if there was no appeal the defendant would not ask for costs; this was agreed to by counsel for the plaintiff, and a judgment of nonsuit, without costs, was accordingly entered. Notice of appeal was subsequently given, and the case came on for hearing in the Divisional Court before Denman and Hawkins, JJ., who were of opinion that the undertaking was binding on the plaintiff. They accordingly dismissed the appeal, but gave leave to appeal to the Court of Appeal.

Archibald, for the plaintiff. A next friend is a person appointed by the Court, and his power over the action is not absolute, for the steps he takes in it must be in the interest of the infant: *Sinclair* v. *Sinclair* (1); and the Court will only sanction a compromise if it appears to be beneficial to the infant: *In re Birchall.* (2) Here there can be no benefit to the infant, because an infant is not liable to costs: *Grave* v. *Grave* (3); *Turner* v.

(1) 13 M. & W. 640.
(2) 16 Ch. D. 41.
(3) Cro. Eliz. 33.

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Turner. (1) Even if the next friend could recover from the infant the costs for which he is liable, such a right would be valueless in this case where the plaintiff has no property. The effect, therefore, of the compromise was not to benefit the infant, but only to relieve the next friend from costs.

Courthope-Munro, for the defendant. The next friend has the sole conduct of the action: *Morgan* v. *Thorne* (2), and is competent to give his consent to any matter relating to the conduct of the cause: *Knatchbull* v. *Fowle.* (3) A power to compromise is incident to authority over the conduct of the cause: *Leeming* v. *Murray* (4); *In re West Devon Great Consols Mine.* (5) The compromise was made in good faith, and binds the infant, even if the next friend has no recourse against her estate for costs, as it would appear that he has in some cases: *Whittaker* v. *Marlar* (6); *Pritchard* v. *Roberts.* (7)

LORD ESHER, M.R. This is an action by an infant by means of her next friend, who undoubtedly has the conduct of the action in his hands. If, however, the next friend does anything in the action beyond the mere conduct of it, whatever is so done must be for the benefit of the infant, and if, in the opinion of the Court it is not so, the infant is not bound. In the present case the waiver of the right to appeal was a matter beyond the ordinary conduct of the action, and the question therefore arises whether it was for the benefit of the infant. It seems to me that it could not possibly be so. The position of the infant is such that no costs can be recovered from her either directly or indirectly, for she has no estate, and is apparently disabled for life. The next friend, therefore, alone is liable for costs, and he alone can gain by the compromise, while the right of appeal which was given up might possibly be of the greatest value to the infant. The compromise was no doubt entered into in all fairness, but it was not in my opinion for the benefit of the infant and cannot be binding on her, and did not prevent the prosecution of the appeal in the Divisional Court.

(1) 2 P. Wms. 297; Str. 708.
(2) 7 M. & W. 400.
(3) 1 Ch. D. 604.
(4) 28 W. R. 338.
(5) 38 Ch. D. 51.
(6) 1 Cox, 285.
(7) Law Rep. 17 Eq. 222.

BOWEN, L.J. I am of the same opinion. The only reason that the next friend of an infant is entitled to bind the infant in matters connected with the cause is that he is the officer of the Court to take all measures for the benefit of the infant in the litigation in which he appears as next friend. In the present instance it is not necessary to consider whether there is any indemnity from the infant or the infant's estate to the next friend in respect of the costs to which he makes himself primarily liable. It is clear that in this case there is no such recourse over because of the impecunious state of the infant, and to suggest that the next friend here is obtaining a benefit for the infant because he gets a release from the costs is idle. Such a compromise cannot in this case be for the benefit of the plaintiff, and cannot therefore be sustained against her.

FRY, L.J. A next friend has no power to enter into a compromise by which the infant gives up a right and the next friend obtains a benefit. This is a compromise exactly of that sort, although I have no doubt it was made in good faith.

Appeal allowed. (1)

Solicitors for plaintiff: *Hamlin, Grammer, & Hamlin.*
Solicitors for defendant: *Emmet, Son, & Stubbs.*

(1) The case was remitted to the Divisional Court, and it was agreed that the judgment in the county court should be altered, if necessary, as to the costs.

A. M.

1889
Feb. 5;
March 18.

[IN THE COURT OF APPEAL.]

PRICE & CO. AND OTHERS *v.* THE A1 SHIPS' SMALL DAMAGE INSURANCE ASSOCIATION, LIMITED.

Insurance (Marine)—Memorandum—Free from Average under three per cent. unless General—General Average and Particular Average not to be added together.

Under the memorandum in a marine policy by which the subject-matter of insurance is warranted free from average under a certain amount per cent., unless general, or the ship be stranded, sunk, or burnt, a general average loss cannot be added to a particular average loss to make up a loss amounting to the specified percentage.

A ship was insured by a policy expressed to be against all losses which could not be recovered under an ordinary Lloyd's policy by reason of the insertion therein of the memorandum against average under three per cent., unless general, or the ship be stranded, sunk, or burnt. The ship while covered by the policy, through stress of weather, incurred a particular average loss; and further damage to her was incurred under such circumstances as to constitute a general average loss. The particular average loss did not amount to three per cent. of her value, but the general and particular average losses taken together did amount to such percentage:—

Held, that the assured were entitled to recover the particular average loss under the policy.

APPEAL from the judgment of Cave, J., on further consideration.

The action was upon a policy of marine insurance, and was tried before the learned judge without a jury, when the facts appeared to be in substance as follows:—The plaintiffs were the assured under a policy effected with the defendants upon a ship called the *Marlborough Hill*. The policy was a time policy, from June 1, 1885 to May 31, 1886, in which the insurance was expressed to be "against all losses which cannot be recovered under an ordinary Lloyd's or a similar policy of insurance by reason of the insertion therein of the clause, Warranted free from average under three pounds per cent., unless general, or the ship be stranded, sunk, or burnt." The ship was valued in the policy at 30,000*l*. The ship, while on a voyage from Calcutta to London, and while covered by the policy, encountered stress of weather, and was thrown by a sudden squall on her beam ends. Damage was thereby caused to the bulwarks, steering gear and cross-head

of the rudder, and other parts of the ship. The captain then, for the general safety of the ship and cargo, and in order to right the ship, was obliged to cut away a large amount of the rigging and sails, which was lost, and in consequence of cutting away such rigging portions of the masts were sprung. It was admitted that these last-mentioned losses were incurred under such circumstances as to be a general average loss. The ship having arrived safely in the port of London, an average adjustment took place, and it was agreed that the facts and figures as to the losses were as stated in the average statement. It appeared therefrom that the amount of loss sustained in respect of the particular average losses to the ship and the general average sacrifices together was 1674*l.* 4*s.* 5*d.*, of which sum 1288*l.* 6*s.* 11*d.* was on account of the general average sacrifices, and 385*l.* 17*s.* 6*d.* on account of the particular average loss to the ship; and that the ship's contribution to the general average loss was 436*l.* 0*s.* 7*d.*, the cargo and freight contributing the balance. The ship was covered at the time of the loss by other policies, which contained the usual warranty against average under three per cent., unless general, or the ship be stranded, sunk, or burnt. The plaintiffs claimed to recover upon the policy made with the defendants in respect of the particular average loss to the ship of 385*l.* 17*s.* 6*d.*, which they alleged could not be recovered under the other policies, as being under three per cent. of the value of the ship.

The defendants contended that for the purposes of the warranty against average under three per cent. in the ordinary form of policy, the whole of the loss, that is to say both the general average losses and the particular average losses, must be taken together, and if so the loss amounted to more than three per cent. of the value of the ship, being 1674*l.* 4*s.* 5*d.*, and that therefore the particular average losses could be recovered under the Lloyd's policy, and consequently were not recoverable under the policy effected with them.

The learned judge gave judgment for the plaintiffs for the amount claimed.

1889. Feb. 5. *French, Q.C.*, and *Carver*, for the defendants. The loss in respect of which the action is brought could have

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been recovered under the ordinary Lloyd's policy, and therefore is not covered by the policy sued upon. "Average" means partial loss. There being a partial loss to the extent of 1674*l.*, and therefore amounting to more than three per cent, the warranty against average, i.e. partial loss, below that amount never came into play at all. The words "unless general, &c.," are an exception upon an exception, and do not apply unless the partial loss is under the specified percentage. The day after the loss, the plaintiffs could have recovered the total amount of it, including that which was general average, from the underwriters on the Lloyd's policies: 2 Parsons on Marine Insurance, 289–291. The fact that there might subsequently, if the vessel arrived safely, be a right to contribution in respect of general average, could not affect the plaintiffs' right of action or prevent the whole loss being a partial loss, for which the plaintiffs might immediately sue the underwriters, although the effect might be that the underwriters would be subrogated to the plaintiffs' right to contribution. Months might elapse before it could be determined whether there would be general average or not, and before the average adjustment could be made. It is not a question here of adding together a partial loss and a general average contribution attributable to the ship to make up the three per cent. The particular average and the general average contribution added together would not in this case amount to three per cent. The contention here is that the whole of the 1674*l.* constituted one entire partial loss, and, such loss being above three per cent., the memorandum has no application. The passages in the text-writers, such as Stevens, Arnould, Benecke, and others, which seem opposed to the defendants' contention, probably only mean that a general average contribution cannot be added to a partial loss to make up the required percentage. That may be admitted; but this is a question of a general average loss and particular average loss together constituting partial loss above the specified percentage, a case to which wholly different considerations apply. *Dickenson* v. *Jardine* (1) is an authority in the defendants' favour. The decision in the American case, *Padelford* v. *Boardman* (2), is no doubt in favour of the plaintiffs: but it is

(1) Law Rep. 3 C. P. 639. (2) 4 Mass. 548.

not binding on this Court, and it is contended that on principle it cannot be supported, for the reasons already mentioned.

They also cited *Peters* v. *Warren Insurance Co.* (1); *Stewart* v. *Merchants' Marine Insurance Co.* (2); *Lidgett* v. *Secretan* (3); *Wilson* v. *Smith* (4); *Mavro* v. *Ocean Marine Insurance Co.* (5); *Dyson* v. *Rowcroft.* (6)

Joseph Walton, for the plaintiffs. *Dickenson* v. *Jardine* (7) is not an authority for the defendants. All that case decided was that, where there were goods jettisoned under circumstances which made the jettison a general average loss, the owner could sue the underwriters for the whole of the loss without having first collected the contributions to which he was entitled, and the underwriters, having paid him, would be subrogated to his rights to contribution. There was no question there of a partial loss; the loss by jettison was total. The true construction of the memorandum is that "warranted free from average under three per cent. unless general" is equivalent to "warranted free from particular average under three per cent." Therefore, assuming that the whole of the 1288*l.* could be recovered from the underwriters on the Lloyd's policies as alleged, yet being general average loss it must be put aside in calculating the percentage for the purpose of the memorandum. There is a long chain of authority to shew that average is always divided into general and particular. Losses are total and partial; and partial losses may be either general or particular average. General average loss and particular average loss cannot be added together under the memorandum.

French, Q.C., in reply.

Cur. adv. vult.

1889. Mar. 18. The following judgments were delivered:—

LORD ESHER, M.R. In this case the action is against the insurers on a policy which is expressed to be against all losses which cannot be recovered under an ordinary Lloyd's or other similar policy by reason of the insertion therein of the clause

(1) 1 Story's Rep. 463.
(2) 16 Q. B. D. 619.
(3) Law Rep. 6 C. P. 616.
(4) 3 Burr. 1550.
(5) Law Rep. 10 C. P. 414.
(6) 3 B. & P. 474.
(7) Law Rep. 3 C. P. 639.

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"warranted free from average under three pounds per cent. unless general, or the ship be stranded, sunk or burnt." There has been a loss; but the defendants say that this loss is not covered by the policy, because it could be recovered under the ordinary form of policy with that clause inserted. The question is whether that contention is correct. The loss occurred thus: by reason of bad weather damage was done to the ship, and then, in consequence of what happened, further loss had to be incurred for the good of cargo and ship. The first loss was clearly an average loss on the ship, and the further loss incurred for the good of ship and cargo was undoubtedly a general average loss. The particular average loss on the ship taken by itself falls below three per cent. of the ship's value, but, if the general average loss can be added to it, then the sum of the two taken together exceeds three per cent. of the value. The question therefore is whether under the ordinary Lloyd's policy containing the memorandum, in order to see whether the loss exceeds or falls short of the specified percentage, a general average loss on the ship or goods, as the case may be, can be added to a particular average loss on the same ship or goods. That question depends on the true construction of the memorandum or warranty in question. Now, to say that the language of these Lloyd's policies can be construed altogether according to strict grammar is, as has often been observed, next to impossible. The phraseology used in them is in many respects regardless of grammar, but the meaning of it has been understood for many years among shipowners and mercantile men in a certain sense. Still, one must examine the language of this memorandum or warranty, and construe it, having regard, as far as possible, to ordinary rules of grammar. The usual form runs as follows: "Corn, fish, salt, fruit, flour, and seed are warranted free from average unless general, or the ship be stranded: sugar, tobacco, hemp, flax, hides and skins are warranted free from average under five pounds per cent., unless general, or the ship be stranded." Pausing there, how would those words be read, having regard to their grammatical construction? "Average," as used in this connection, is clearly a technical expression, and it has a well-established mercantile signification. It means a partial as distinguished from a total loss.

If there is a total loss of the whole of the things mentioned, or of the whole of any one of them, or a total loss of any part which is so put on board as that there can be a total loss of that part, the clause will not apply to that loss. Taking "average" then to mean average or partial loss, the meaning is that certain articles mentioned are warranted free from partial loss or partial loss under a certain percentage, unless it be a general average loss, that is to say, a loss voluntarily occasioned for the safety and benefit of the common enterprise. Considering the nature of the articles enumerated in the clause, and that they are of entirely different kinds and do not come from the same places, and it is consequently absurd to suppose that there would be a cargo including all of them on board the ship, and considering that this is a common form intended for general application, it seems to me to follow that the application of the clause must be contemplated, although the whole of these articles mentioned are not on board, or even if only one of them is on board. Having regard to the grammatical construction of the clause, and still more to the ordinary business view of the matter, it seems to me that on the face of the thing each of the articles mentioned must be taken separately for the purpose of applying the clause. The reason for the introduction of the clause has often been suggested by lawyers, whether rightly or wrongly I know not. It has been said that it was inserted in order to prevent disputes about small losses. It may be so, but I am not sure that it is so. It has been also suggested that it was introduced because in the case of certain perishable articles it is very difficult to ascertain the real cause of a small loss—whether it is due to the perishable nature of the thing or sea damage. Whichever be the true reason, it would be equally difficult to determine the existence or cause of a small loss in respect of several of the articles as to determine the existence or the cause of a small loss in the case of one. So that, whichever the reason of the insertion of the clause may be, it seems to me that it would be equally absurd as a matter of business to suppose that it was intended that all the articles were to be taken together in order to ascertain the percentage for the purposes of the clause. Therefore I should say that, reading the clause as grammatically as one can,

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it means that sugar is warranted free from average under five per cent. unless general; and so on with regard to each article mentioned. Then we come to the portion of the clause which warrants other goods and also the ship and freight free from average under three per cent. unless general, or the ship be stranded. That must, as I have said, in my opinion, be read as equivalent to "warranted free from partial loss under three per cent. unless it be a general average loss." Upon that reading of the words the conclusion, as it appears to me, must be that, if the ship suffers partial loss under three per cent., which is not general average, such loss cannot be recovered under the policy. If there be a general average loss, that can be recovered, although it is below three per cent.: but the particular average and the general average cannot be added together.

But it is almost useless to deal with the language of the ordinary marine policy in this way, if there be any authority on the subject. There is not so much authority on this subject as could be wished. Arnould, in his work on Marine Insurance, which is no doubt a careful and instructive work, does not appear to me to have dealt very fully with the point, but I think it may be gathered from what he says in his Chapter on the Memorandum or Warranty "Free from Average," that his view was that particular and general average cannot be added together for this purpose. I will refer next to the work of Stevens, who though not a high legal authority, inasmuch as he was not a lawyer, is nevertheless an accurate writer on the subject. At p. 224 of the 5th ed. of Stevens on Average, I find that he puts the construction, which I have already suggested, on the memorandum, with regard to the articles enumerated under the head of "free of average under five per cent." He says, that, if several be insured together and the average be claimed on the whole, the claim should be analyzed to find if each be damaged five per cent.; e.g. if a claim be made of 100*l.* on flax and hemp valued at 1000*l.*, i.e. ten per cent., unless each of them separately amount to five per cent., the claim can only be substantiated on one of them, and he goes on to state, p. 232, that general and particular average cannot be added together to make the underwriters liable if they jointly amount to the requisite percentage.

Then when I look to the book on which I place most reliance with regard to cases of marine insurance, viz., Phillips on the Law of Insurance, I find it stated in paragraph 1779, vol. 2, p. 449 of the 5th ed. as follows: "Under the general exception of losses under three, five, or any other rate per cent., not specifying any kind of loss, the question occurs, What damage or loss is to be included in making up the amount of the loss? And first, can general and particular average losses be added together to make up the rate? The practice appears to have been not to add together the general and particular average to make an amount exceeding the excepted rate." Here we have the exact matter in question described with the accuracy with which the writer always expresses the propositions which he lays down; and he goes on to say, speaking with regard to America: "And this practice has been ratified in jurisprudence so far as it has come under judicial cognizance." I think that the case of *Padelford* v. *Boardman* (1) is exactly in point, and supports the statement of the writer. There was in that case a policy of insurance on a schooner, valued at 4000 dollars, which contained a memorandum exempting the insurers from liability for partial loss under five per cent. unless the damage happened by stranding or bilging, excepting in all cases general average. This clause was not exactly in the same terms as the memorandum in the ordinary Lloyd's policy, but it was to the same effect. The ship was damaged in her sails and rigging by the winds and storms, and in consequence it became necessary for her to put into Norfolk in Virginia to refit. She was there repaired, and afterwards completed her voyage. It was clear that the expense of putting into the port of Norfolk was a general average loss. The cost of the repairs to the ship, which was particular average on ship, was 156 dollars; the expenses consequent on the putting into port and such expenses as were general average amounted to 245 dollars; so that the particular average loss on the ship was less than five per cent., but, if the general average and the particular average could be added together, the total exceeded five per cent. So exactly the same question arose as that now before us. The judgment at p. 551 states as follows: "In the case at

(1) 4 Mass. 548.

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bar, the partial loss or damage sustained by the vessel and the contribution to which the same property became liable by the expenses voluntarily incurred in seeking a port to refit were occasioned, in the first instance, by the same accident. The cases are distinguished however by the terms of the policy, and in the nature of the thing. The damage sustained by the vessel is the partial loss, but the contribution is a charge to which the property saved is made liable by the marine law; for the former being under five per cent. the underwriter is not liable by an express exception which is not extended to the latter. And that these are not to be blended by any constructive inference appears in the several adjudged cases that have been mentioned. And this opinion is conformable to the usage of merchants and insurers, as it has been understood on inquiry." Nothing could be more distinct than this decision, which is to the same effect as the passages in the marine text-writers to which I have referred. I come to the conclusion, therefore, that general average and particular average losses cannot be added together in determining whether there has been a loss amounting to three per cent. As to the general average loss it does not signify whether it is over or under three per cent. As to the particular average loss it cannot be recovered under the Lloyd's policy if it is under three per cent., and, therefore, as the particular average loss in this case is under three per cent., and therefore cannot be recovered under that policy, it comes within the terms of the policy effected with the defendants, and the case must be determined accordingly. I wish to make some observations as to one other case which was referred to, viz., *Stewart* v. *Merchants' Marine Insurance Co.* (1) In my opinion that case is not in point. The question which it was necessary to consider in that case was not whether a general average loss could be added to a particular average loss for the purposes of the memorandum, but whether successive losses on the same thing, e.g. on flax or sugar, could be added together. It was not decided, but on inquiry into the law it seems to me to have been assumed, that that could be done with regard to goods if the successive losses occurred on the same voyage. Then it was considered whether that could be done

(1) 16 Q. B. D. 619.

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with regard to a policy on ship, and I think that the decision goes to shew that it could. Then there was the further point that, the policy being a time policy, there might be successive small losses on different voyages, and it was held that successive losses on different independent voyages could not be added together for the purposes of the memorandum, although they all occurred within the time covered by the policy, on the ground that the long established maritime view was to divide the voyages and treat each voyage as a separate matter. But the question whether successive losses on the same thing could be added together is a totally different matter from the question whether losses on different things or losses of a distinct character can be added together. I do not think that this decision has any bearing on the present case. For the reasons I have stated, I am of opinion that the decision of Cave, J., was correct, and that this appeal must be dismissed.

FRY, L.J. Bowen, L.J., has asked me to deliver judgment next. This case turns upon the construction of the memorandum in the ordinary Lloyd's policy and policies framed in similar terms. Without reading the memorandum again, I will say at once that the construction which I put upon it is that the words "warranted free from average under three pound per cent., unless general," are equivalent to "warranted free from particular average under three pounds per cent." The facts in this case were these. The ship sustained damage in a storm to an amount of between 300*l.* and 400*l.*, which was an average, i.e., a partial loss, and which would be undoubtedly a particular average loss: but then the captain caused parts of the rigging and sails to be cut away, with a view to the safety of the general enterprise, that is to say, the preservation of the ship and cargo. That clearly was a sacrifice for the benefit of the common undertaking, and, therefore, was what is called a general average loss, giving rise to a general average contribution, but it was, according to my view, in no sense a particular average loss. That sacrifice resulted in a loss to the ship of 1200*l.* odd, and a proportion of it amounting to 400*l.* odd has been attributed to the ship. It is admitted that, unless the general average loss can be added to

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the particular average loss to the ship, the defendants must fail, because the particular average loss does not amount to three per cent. of the value of the ship. In my opinion, the two things cannot be so added together. Though both are called "average," they are essentially different things; the one being a partial injury to the ship by the elements, falling on the ship itself, the other being a sacrifice made voluntarily in the interests of the common undertaking. It was urged upon us for the defendants that the underwriters on the Lloyd's policies might have been sued immediately after the loss happened for the whole amount of such loss, including the damage arising from the general average sacrifice; that such loss, taken as a whole, was at that time an average loss over three per cent., and the fact that there might be a right to contribution afterwards in respect of a portion of it did not prevent its being such an average loss at that time. For the reasons I have already given, I do not think that that argument is tenable. Assuming that the plaintiffs could have sued the underwriters on the Lloyd's policies for the damage arising from the general average sacrifice, they could only do it, I think, on the terms of subrogating those underwriters to their own rights of claiming contribution on the ground of general average. Even if they could have sued as alleged, the two losses remain essentially distinct in their character and origin. According to the established practice of merchants and shipowners and of underwriters, the two kinds of loss never could be added together as suggested. I regard the passages in the books and the cases, to which the Master of the Rolls has referred, as clearly shewing that general and particular average losses cannot be added together for the purposes of the memorandum, and that the practice in this respect rests upon the fact that both in their origin and character the two things are essentially different.

BOWEN, L.J. I am of the same opinion, and I have very little to add. This clause warranting the ship and goods free from average under a certain amount per cent. has often been the subject of consideration in the courts and its history is well known. Whatever the exact reasons for its introduction may have been, it is obvious that the object was to prevent small demands

against underwriters in respect of small average losses. The first great decision which has given shape to the subsequent decisions on the clause was that of Lord Mansfield in *Wilson* v. *Smith* (1), where it was held that the words "unless general" were to be read as an exception, and not as a condition, with this consequence, that the occurrence of a general average loss was held not to entitle the assured to recover for a particular average loss. In the present case we are called on still further to develop the true construction of the clause, the question before us being whether general and particular average losses can be added together so as to make the underwriters liable if they together amount to the specified percentage of the value of the subject-matter of insurance. It seems to me that the authorities relied on by the Master of the Rolls and my brother Fry all tend in the same direction, and in particular the case of *Padelford* v. *Boardman* (2) is directly in point. I am also satisfied that the general practice of those who have had to deal with this clause has been not to add the two things together as suggested by the defendants. In principle I do not see how they can be so added together, and I think that, if we decided that they could, we should be departing from the general practice of those who have had to deal with the matter. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Rowcliffes & Rawle, for Lightbound.*

Solicitors for defendants: *Wynne, Holmes, & Wynne, for H. Forshaw & Hawkins.*

(1) 3 Burr. 1550.

(2) 4 Mass. 548.

E. L.

1889
Feb. 22.

[IN THE COURT OF APPEAL.]

IN RE MORGAN. EX PARTE MORGAN.

Bankruptcy—Disclaimer—Leasehold Property of Bankrupt—Disclaimer by Trustee—Application for Vesting Order—Persons to be served with Notice—Discretion of Court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-s.* 6.

Upon an application under sub-s. 6 of s. 55 of the Bankruptcy Act, 1883, for a vesting order in relation to leasehold property of a bankrupt, which has been disclaimed by the trustee in the bankruptcy, the Court has a discretion to direct which of the persons entitled to apply for such an order shall be served with notice of the application, and, if in the opinion of the Court, the applicant has not served all the persons who ought to be served, he may be ordered to pay the costs occasioned by his default.

Until the point left undecided in *In re Finley* (21 Q. B. D. 475), as to the extent of the liability of a mortgagee by sub-demise from a bankrupt under an order vesting the original lease in him, shall have been decided, it will be proper to serve the lessor with notice of such an application.

APPEAL against the refusal by the registrar of an application, under sub-s. 6 of s. 55 of the Bankruptcy Act, 1883, for a vesting order in respect of certain property comprised in a lease which had been disclaimed by the trustee in the bankruptcy of M. C. Morgan.

On May 21, 1878, Charles Baynton, the owner in fee of the property, demised it to John Morgan for a term of twenty-one years from March 25, 1878. On January 3, 1879, the lessee assigned the property to J. R. Evans for the then residue of the term. On February 28, 1884, Evans assigned the property to M. C. Morgan for the then residue of the term, and on April 15, 1887, M. C. Morgan mortgaged the premises by way of under-lease to Francis Ward. On September 23, 1887, M. C. Morgan was adjudicated a bankrupt. On November 18, 1887, the trustee in the bankruptcy obtained leave from the Court to disclaim the bankrupt's interest in the lease, and he afterwards executed a disclaimer. After the adjudication of bankruptcy the lessee was compelled to pay the rent of the property to the lessor, and he applied to the Court for an order that, unless the mortgagee should, within seven days from February 2, 1889, declare

his option to accept an order vesting in him the demised property, subject to the same liabilities and obligations as the bankrupt was subject to under the original lease in respect of the property at the date when the bankruptcy petition was filed, the mortgagee should be excluded from all interest in and security upon the property. The notice of motion was served only on the mortgagee.

The registrar refused the application, on the ground that notice of it ought to have been served on Evans, the first assignee of the lease.

The lessee appealed.

Yate Lee, for the lessee. The vesting order ought to have been made. There is no reason why Evans should be served; he is under no personal liability to the lessor. It is believed that he is dead, and that he was insolvent. Sub-sect. 6 (1) of s. 55 does not make it obligatory to serve every one who may claim to have an interest in the property, or who may be under a liability in respect

(1) Sect. 55, sub-s. 6: "The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.

"Provided always, that where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt."

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of it. The Court has a discretion as to the persons to be served with notice of the application. The intermediate assignees can have no interest. The effect and operation of s. 55 is shewn by *Ex parte Shilson* (1) and *In re Finley*. (2) Before the registrar it was contended that the lessor ought to have been served, but he has no interest in the matter.

F. Cooper Willis, for the mortgagee. Evans, as assignee of the term, ought to have been served. The lessee, having been sued on the covenants in the original lease, is entitled to sue the assignee on his covenant to indemnify him against those covenants. The effect of a vesting order might be to release Evans. Moreover, Evans might wish to take a vesting order himself, and an order vesting the property in the mortgagee would exclude him. Every person who might apply for a vesting order ought to have an opportunity of being heard on the application. Upon an application for leave to disclaim a lease, the practice is to serve all the persons who have any interest in the property. *Ex parte Shilson* (1) is distinguishable.

Yate Lee, in reply.

LORD ESHER, M.R. An application having been made to the registrar under sub-s. 6 of s. 55 of the Bankruptcy Act, 1883, for an order that, unless Ward, a mortgagee by way of under-lease from the bankrupt, would accept an order vesting the demised property in him in the terms of that sub-section, he should be excluded from all interest in and security upon the property, the objection was taken that Evans, the first assignee of the lease, was not before the Court, and the registrar thereupon declined to make the order. I do not think the point was very clearly stated to him, and I am not quite certain what the contention before him was. If the argument was, that it was a condition precedent to the making of the order that Evans should have been served, that would be one thing. If the argument was, that Evans was a person who in the exercise of the registrar's discretion ought to have been served, that would be quite another thing. If the argument was, that service of notice of the application upon Evans was a condition precedent, it

(1) 20 Q. B. D. 343. (2) 21 Q. B. D. 475.

would follow, as it seems to me, that on such an application every one in the same position as Evans, i.e., every assignee of the lease, ought to be served. However many assignees there may have been, during however long a period, everyone of them must be served, or the applicant must prove his inability to serve them. If the argument was the first of the two which I have stated, I think it cannot be maintained. I do not think it is a condition precedent to the making of the order that every person who has an interest in, or who is under liability in respect of, the property should be served. It seems to me that the only condition precedent is, that the person against whom the application is made should be served with notice of it. When that has been done, I have no doubt that the registrar has a right to require that any other of the persons who have an interest, or who are under liability, whom he may think fit should be served. If this be so, the applicant who serves only the person against whom he asks for the order runs the risk of having served too few of the persons interested, and of having to pay the costs occasioned by his not having served a sufficient number of them. I think the registrar would have power to make the applicant pay costs, if he should think he was in default in this respect. I am not quite certain whether the registrar intended to decide that he had no jurisdiction, or whether he meant to say that under the circumstances he, in the exercise of his discretion, thought that Evans ought to have been served. I think, however, that we are bound to consider that the registrar was acting on the view which we hold to be the right one, and that he meant to say that in the exercise of his discretion he thought it desirable that Evans should be served. The case cannot therefore be finally disposed of until Evans (or his representatives, if he is dead) has or have had an opportunity of saying whether he or they desire to assume the liability under the lease. We have settled the terms of an order (which my brother Bowen will read) which we think will do justice under the circumstances of the case, and will save the parties unnecessary expense.

BOWEN, L.J. Sect. 55, sub-s. 6, enables an application to be made for an order vesting leasehold property of a bankrupt, which

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has been disclaimed by his trustee, in some person. In property of that nature other persons besides the applicant may, and, indeed, must, have an interest, or must be under a liability in respect of it. Various persons are entitled under the section to apply for an order vesting the property in themselves or in some one else. The application may be made by any person either claiming any interest in the property, or under any liability in respect of it which is not discharged by the Act.

It is obvious that in the case of a lease there may be many persons who claim to be interested in the property, and many others, who, even if they have no interest in it, have come under some liability in respect of it. All these persons have a right to compete for a vesting order, if they desire it. Primâ facie the Court would not make an order vesting the property in one out of the class who have a right to apply, and who may possibly be injured by an order vesting the property in some one else, without giving the other members of the class an opportunity of being heard. But it is obvious that, in the case of a lease for a long term, if you were to insist on a rigid rule that every member of the class must be served, the expense would be enormous, and in the result it would be barren of any fruit, for the great majority of the class would not care a straw about the matter. Subsect. 6 of sect. 55 says that the Court may make the order "on hearing such persons as it thinks fit." The registrar is entitled to deal with the matter broadly and in a business-like way, and, if he sees that the interests of any person are likely to be really affected by the order, he may say that that person must be served with notice. If, on the other hand, he thinks that the interest of any person is merely technical, he may deal with the matter in a broader way, and proceed without requiring such a person to be served. The applicant has to submit himself to the discretion of the registrar. If he omits to serve some person who in the interests of justice ought to have an opportunity of being heard on the application, he exposes himself to the risk of having to bear the costs resulting from his improvidence. Up to the time when the matter comes before the registrar, the applicant is left free, but then the registrar must exercise his discretion as to the persons who ought to be served. In the present case the

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registrar thought that Evans ought to be served, or that some explanation should be given of his absence. No proof has been given of his death, and there is no satisfactory evidence why he was not brought before the Court. It appears to me that the registrar was right in thinking that Evans was entitled to compete for a vesting order. I am not quite sure whether the point presented to the registrar was the necessity or the propriety of Evans being present. But I think we ought not to overrule the exercise of the registrar's discretion, or to make a vesting order, without giving Evans an opportunity of being heard. The lessor also has an interest in the disclaimed property, and he may have an interest in raising the important point of law which was left undecided in *In re Finley* (1), viz., whether if an order is made vesting the property in a mortgagee by sub-demise, the mortgagee will be liable under the original lease to the same extent as if he had been the original lessee, or only as if he were an assignee of the original lease. It would, therefore, be prudent and just that the lessor should have an opportunity of being heard, if he desires it.

The order which we think will meet the justice of the case is this:—A vesting order in the terms of the notice of motion. The applicant to have his costs in the court below. No costs to be given of the appeal. The order is not to be drawn up for a month. Notice is to be given forthwith by the applicant's solicitors to the lessor and to Evans or, if he is dead, to his legal personal representative, if there be any. An affidavit of service of the notice, or of the facts which excuse it, is to be lodged with the registrar within fourteen days. Liberty will be reserved to the lessor and to Evans, or his personal representative, to apply to this Court to rescind or vary the order at any time before this day month.

FRY, L.J. I entirely concur in the proposed order, and I agree in the view of the construction of s. 55, sub-s. 6, which has been expressed by my learned Brethren. It seems to me plain that the Court is to determine what persons it is necessary or proper to have before it as respondents to the application. But,

(1) 21 Q. B. D. 475.

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though a discretion is vested in the Court as to the persons who are to be served, the nature of the application indicates the persons from whom the respondents are to be selected. There are two classes—persons who claim an interest in the property, and persons who have come under a liability in respect of it. Each member of either of those classes is entitled to apply for a vesting order under sub-s. 6. If one of them applies, it is reasonable that some or all of his possible competitors should be heard before the Court makes the order. The Court has only one estate to give, and can only make one vesting order, and it must be careful not to give the property to the person who has the worst claim to it. How many of the persons who might make the application should be brought before the Court must be a matter for the discretion of the Court in each particular case. The lessor has a possible interest in the point which was raised, but not decided, in *In re Finley* (1), or in a question which arises out of that point. When that point has been decided it may be that the lessor can be dropped out altogether from the number of possible competitors for a vesting order. But the number of persons who are to be served in any case must be in the discretion of the Court. It must be taken that the registrar held that Evans was included among the persons entitled to apply for the order, and that it was desirable that he should be served with notice of the application. I think the lessor ought also to be served.

LORD ESHER, M.R. It follows from our decision that, until the point raised in *In re Finley* (1) has been decided, it will always be prudent to serve the lessor with notice of an application of this kind.

Order of registrar varied.

Solicitors for appellant: *D. Jones & Linnett.*
Solicitor for respondent: *J. J. Chapman.*

(1) 21 Q. B. D. 475.

W. L. C.

[IN THE COURT OF APPEAL.]

1889
Feb. 20.

TOMKINS AND ANOTHER *v.* JONES.

County Court—City of London Court—Jurisdiction—Hereditaments—Leasehold Property—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 56.

By s. 56 of the County Courts Act, 1888, except as in this Act provided, the Court shall not have cognizance of any action "in which the title to any corporeal or incorporeal hereditaments shall be in question;" and by s. 60 jurisdiction is given to try such actions where neither the value of the hereditaments in dispute, nor the rent thereof, shall exceed 50*l.* by the year.

Where the defendant disputed the plaintiffs' title to houses held by them under leases for years, and exceeding the specified yearly value:—

Held, that the title to "hereditaments" was in question within the meaning of s. 56, and therefore that the county court had no jurisdiction to try the action.

APPEAL from a decision of the Queen's Bench Division.

The action was brought in the City of London Court, and the plaintiffs' claim was for two quarterly instalments of an annuity of 100*l.*, less income tax, alleged to be due from the defendant under an agreement of May, 16, 1885, made between the defendant and the plaintiffs.

By that agreement the defendant agreed to pay during the joint lives of the plaintiffs, and during the life of the survivor of them, an annuity of 100*l.*, payable quarterly in advance, and in consideration thereof (inter alia) the plaintiffs agreed to assign to the defendant certain houses held by them under leases for terms of years, and the agreement provided that the payment of the annuity should be expressly subject to the plaintiffs' titles to the leasehold properties being satisfactorily made out.

In his statement of defence the defendant pleaded, in substance, that the plaintiffs' title to the leasehold properties had not been, and could not be, satisfactorily made out, and therefore that he was not liable to pay the annuity.

The defendant applied at chambers for a certiorari to remove the action from the City of London Court to the High Court, on the ground that the title to corporeal hereditaments was in question within the meaning of s. 56 of the County Courts Act,

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1888 (1), and his affidavit stated that the trial of the questions in dispute in the action would involve the trial of the title to the leasehold properties, of which the annual value exceeded 50*l.*

A master having made an order for a certiorari, Mathew, J., in chambers rescinded that order. The defendant then appealed to a Divisional Court (Lord Coleridge, C.J., and Hawkins, J.), who, being of opinion that the question of title was bonâ fide intended to be raised in the action, rescinded the order of Mathew, J., and restored the master's order.

The plaintiffs appealed.

Pym Yeatman, for the appellants. The leaseholds assigned by the agreement of May 16, 1885, are not "hereditaments" within s. 56. An hereditament is that which goes to the heir and not to the executors. In *Lloyd* v. *Jones* (2) Wilde, C.J., said: "Hereditament is defined in the text-books of authority to signify 'all such things, whether corporeal or incorporeal, which a man may have to him and his heirs by way of inheritance, and which, if they be not otherwise bequeathed, come to him which is next of blood, and not to the executors or administrators as chattels do. The order for a certiorari, therefore, ought not to have been made.

Joseph Walton, for the respondent. "Hereditaments" include land. Here the plaintiffs' title to land is in dispute; and it

(1) Sect. 56: "All personal actions where the debt, demand, or damage claimed is not more than fifty pounds, whether on balance of account or otherwise, may be commenced in the court; and all such actions shall be heard and determined in a summary way according to the provisions of this Act: Provided always that, except as in this Act provided, the Court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or for any libel or slander, or for seduction, or breach of promise of marriage."

By ss. 59 and 60 jurisdiction is given to the Court in actions of ejectment, and actions in which the title to any corporeal or incorporeal hereditament shall be in question, "where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of 50*l.* by the year."

By s. 185: "The judge and officers of the City of London Court shall respectively have and exercise the like jurisdiction, power, and authority in all respects, except the power of appointing officers, as are for the time being possessed and exercised by the judge and officers respectively of a county court."

(2) 6 C. B. 81.

makes no difference that the interest claimed in the land is a leasehold interest: *Chew* v. *Holroyd*. (1)

Pym Yeatman replied.

LORD ESHER, M.R. In this case the question is whether an application for a certiorari to remove the action from the City of London Court to the High Court ought to be granted. It is said by the defendant, who is the applicant, that the City of London Court had no cognizance of the action. The question, therefore, is not one of discretion, but of law. Sect. 56 of the County Courts Act, 1888, provides that the county court "shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditament shall be in question;" and it is said, on behalf of the plaintiffs, that the title to a corporeal or incorporeal hereditament is not in question, because the only title which is, or can be, in question in the action is the title to leasehold property, and that a leasehold interest in land is not a hereditament. The proviso in s. 56 in the first place specifies "any action of ejectment" as an action of which the Court shall not have cognizance. Now an action of ejectment is an action to recover possession of land, and the proviso then goes away from the right to possession and deals with title:—"or in which the title to any corporeal or incorporeal hereditament shall be in question." It is obvious that amongst corporeal hereditaments land must be included, otherwise the county court could not try an action to recover the possession of land, though it could try an action in which the question in dispute was the title to land. I think it is clear that the word "hereditament" is meant to include land; and if so, the title to land is in question in the present case, though the interest in land which is in dispute is a leasehold interest. I am satisfied, looking at the pleadings and the affidavits, that there is a bonâ fide intention to raise the question of title here; and I am of opinion that the application for a certiorari ought to be granted.

BOWEN, L.J. In this case the defendant alleges that he is entitled to a certiorari, because the action is one in which the title to a corporeal hereditament will be in question within the

(1) 8 Ex. 249.

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meaning of s. 56 of the County Courts Act, 1888. The plaintiffs object on the ground that the title to a hereditament cannot be in question, because a leasehold interest in land is not a hereditament inasmuch as it does not descend to a man's heir. But to my mind that is not the true construction of the word "hereditament" as used in the section. That word is not used as describing the quantum of interest in the subject-matter, but as describing the subject-matter itself, namely, the land. You have the exclusion of the jurisdiction in actions of ejectment where the right to possession of land is in question, and I cannot think the statute meant only to exclude jurisdiction in such actions, and to leave jurisdiction where the title to land was in question. I think the term "hereditaments" clearly includes land, and this view is strongly supported by observing the way in which that term is used in ss. 59, 60, and 61. That construction is not, I think, contrary to any authority. Lord Coke says, "Whatsoever may be inherited is an hereditament, be it corporeal or incorporeal, real or personal, or mixed," Co. Litt. 6 a. In *Chew* v. *Holroyd* (1) Parke, B., said: "The word 'hereditament' merely defines the nature of the thing itself." In *Lloyd* v. *Jones* (2) Wilde, C.J., used some wide expressions, but no question of the title to a hereditament arose, or could arise, in that case. The right claimed was a right of fishery in certain waters, and such a right clearly was not a hereditament. In *Moor* v. *Denn* (3) it was said, with respect to the word "hereditament:" "The settled sense of that word is to denote such things as may be the subject-matter of inheritance, but not the inheritance itself."

I agree in thinking that the question of title is bonâ fide intended to be raised here. I am of opinion that this appeal should be dismissed.

FRY, L.J. I am of the same opinion.

Appeal dismissed.

Solicitor for appellant: *D. E. Chandler.*

Solicitors for respondents: *Burn & Berridge, for Ramsden, Sykes, & Ramsden, Huddersfield.*

W. A.

(1) 8 Ex. 249. (2) 6 C. B. 81.
(3) 2 Bos. & Pul. 247.

THE QUEEN *v.* THE TREASURER OF THE COUNTY OF KENT. 1889 *Feb.* 8.

Justices — County Treasurer—Churchwardens and Overseers—Order to pay Expenses of Burial of Bodies cast on Shore from the Sea—Validity of Justices' Order—48 *Geo.* 3, *c.* 75.

By 48 Geo. 3, c. 75, s. 1, the churchwardens and overseers of any parish in which any dead human body shall be found cast on shore by the sea are required to cause the same forthwith to be removed to some convenient place, and with all convenient speed to be decently interred in the burial-ground of such parish. By s. 5 the churchwardens shall pay all necessary and proper costs and expenses which shall be incurred in or about the execution of the Act; and by s. 6 any justice of the peace for the county or place in which such body shall have been so removed or buried may, by writing under his hand, order the county treasurer to pay to the churchwardens and overseers such sums of money for their costs and expenses in or about the execution of the Act (after the same shall have been duly verified on oath) as to the justice shall seem reasonable and necessary.

A justice's order, made under s. 6, after stating that he had inquired into and ascertained on oath the costs and expenses, amounting to 1*l.* 5*s.*, incurred by the churchwardens and overseers by reason of a dead human body having been found and brought on to the shore within their parish, directed the county treasurer to pay to them the said sum of 1*l.* 5*s.*, according to the 48 Geo. 3, c. 75:—

Held, that the order was bad, because it did not shew that the expenses in question were proper and necessary expenses incurred in or about the execution of the Act, and therefore did not sufficiently state facts to shew, or from which it could be inferred, that the justice had jurisdiction to make it.

RULE, obtained by the churchwardens and overseers of the poor of the parish of Woolwich, calling upon the treasurer of the county of Kent to shew cause why a mandamus should not issue directing him to pay to them certain sums of money under orders made by the stipendiary magistrate of the Woolwich Police Court.

On June 2, 1888, the magistrate made eight orders under 48 Geo. 3, c. 75, as amended by 49 Vict. c. 20 (1), each of those orders being in the following form:—

(1) The statute 48 Geo. 3, c. 75, makes provision for the interment in churchyards or parochial burying-grounds of dead human bodies cast on shore from the sea in cases of wreck or otherwise. By s. 1 the churchwardens and overseers for the time being of any parish in which any such body shall be found, thrown in, or cast on shore from the sea, shall, and

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THE QUEEN, v. TREASURER OF COUNTY OF KENT.

"To the Treasurer of the County of Kent.

"I, Robert Henry Bullock Marsham, Esq., one of the magistrates of the county of Kent, having inquired into and ascertained on oath the payments, costs, and expenses, amounting to 1*l.* 5*s.*, incurred by the churchwardens and overseers of the poor of the parish of Woolwich, in the said county, by reason of a dead human body having been found in the River Thames within the aforesaid parish, and where the tide ebbs and flows, and brought on to the shore thereof, within the aforesaid parish, on the 9th day of February, 1887, do hereby order you forthwith on sight hereof to pay unto," &c. (setting out the names), "churchwardens and overseers of the poor of the before-mentioned parish, the said sum of 1*l.* 5*s.*, according to an Act passed in the 48th year of the reign of his late Majesty King George the 3rd, chapter 75, as amended by 49 Vict. c. 20, and the same shall be allowed you in your accounts. Given," &c.

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they are thereby required, upon notice that any such body has been so thrown in or cast on shore, and is lying within the bounds of their parish, "to cause the same to be forthwith removed to some convenient place, and with all convenient speed to cause such body . . . . to be decently interred in the burial-ground of such parish, so that the expenses attending on such burial do not exceed the sum which at that time is allowed in such parish for the burial of any person or persons buried at the expense of such parish."

By s. 5, "All necessary and proper payments, costs, charges, and expenses which shall be made or incurred in or about the execution of this Act, shall be made and paid by the churchwarden or churchwardens, overseer or overseers, ... for the time being," &c.

Sect. 6: "And for the purpose of re-imbursing him or them all such payments, costs, charges, and expenses, ... it shall and may be lawful to and for any one justice of the peace for the county or place . . . . in which any such body or bodies shall have been so removed and buried as aforesaid, by any writing under his hand, to order and direct the treasurer for such county to pay such sum or sums of money to such churchwarden or churchwardens, overseer or overseers, ... for his or their costs and expenses in or about the execution of this Act (after the same shall have been duly verified on oath) as to the said justice shall seem reasonable and necessary; and such treasurer shall and he is hereby authorised and required forthwith to pay the sum or sums of money so ordered and directed to be paid to the person or persons empowered to receive the same; and such treasurer shall be allowed the same in his accounts."

By 49 & 50 Vict. c. 20, the provisions of 48 Geo. 3, c. 75, are extended to cases in which bodies have been cast on shore from any tidal rivers or navigable waters, and to all bodies found floating or sunken in any such waters and brought to the shore.

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The treasurer having declined to pay the sums mentioned in the orders, this rule was obtained.

Meadows White, Q.C. (*H. Russell*, with him), for the treasurer of the county of Kent, shewed cause. The treasurer is not bound to obey these orders of the magistrate. They are all in the same form, and taking the first for the purposes of the argument, it is bad because it does not shew on the face of it that the sum of 1*l.* 5*s.* is in respect of expenses incurred in the execution of the Act 48 Geo. 3, c. 75. It does not state that they were so incurred, nor does it describe the expenses except by saying that they were incurred "by reason of a dead human body having been found in the River Thames and brought on shore"; s. 3 allows 5*s.* only to be paid to the person who finds the body, and the only other matters in respect of which the churchwardens and overseers are authorized to incur expenses are those specified in s. 1, namely, the removal of the body to some convenient place, and its interment by them in the burial-ground of the parish. The law is correctly stated in Burn's Justice, 30th ed., vol. 3, p. 1109, as follows: "It must expressly appear on the face of the order that the justices had jurisdiction to make it; and the facts raising such jurisdiction should be shewn, or it will be bad."

This order does not satisfy those requirements. There is nothing on the face of it to shew that the magistrate had jurisdiction to make it.

[He was stopped.]

Channell, Q.C., and *H. A. Forman*, for the churchwardens and overseers of the parish of Woolwich, supported the rule. The order is good. It states that the magistrate has inquired into and ascertained on oath the expenses in question, and by s. 6 the duty of ascertaining whether the expenses have been incurred in the execution of the Act, and of assessing them, is cast upon the magistrate, and the conclusion at which he arrives cannot afterwards be questioned. It is not necessary to state in the order that the place within which the body has been removed and buried is a place within the jurisdiction of the magistrate. The words in s. 6, "it shall be lawful for any one justice of the peace

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for the county or place in which such body shall have been so removed and buried as aforesaid," are only meant to be descriptive of the magistrate. They do not impose a condition precedent to the right to re-imbursement. The order sufficiently indicates that the expenses have been incurred in the execution of the Act by the words at the end, "according to an Act passed," &c. The form of order given in Oke's Magisterial Formulist, 6th ed., p. 146, is substantially the same as that which has been used here.

DENMAN, J. I am of opinion that we must decide this case upon the point taken that the magistrate's order is bad upon the face of it. I do not think it desirable to give an opinion upon the further point of law upon which the parties wish us to decide, because if we allow a bad order to stand other similar bad orders are likely to be made. As the parties do not desire that a return to the mandamus should be made and placed upon the record, we must give our judgment in the matter now. I am of opinion that we ought not to allow the mandamus to go, on the ground that the order does not state on the face of it facts which shew that the magistrate had jurisdiction to make it. I agree with the statement of the law cited by Mr. Meadows White from Burn's Justice; every order of justices must state enough to shew the person affected by it that it is based upon some good legal ground. Here the ground upon which it is said that the treasurer is bound to pay to the churchwardens and overseers the sum named in the order, is that they have expended money under 48 Geo. 3, c. 75. I think the order must state at least enough to shew that the matters in respect of which it is made are matters which come within the Act. That, in my opinion, is not sufficiently done by stating merely that the sum named is payable under the Act.

But this order does not even go so far as that; it only directs the churchwardens and overseers to pay "the said sum of 1*l.* 5*s.* according to an Act passed in the 48th year of the reignof his late Majesty King George the 3rd, c. 75." Of themselves, those words are certainly not sufficient. One is compelled to look back to see in respect of what matter the expense of 1*l.* 5*s.* was incurred.

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The order states that it was incurred "by reason of a dead human body having been found in the River Thames, within the aforesaid parish, and where the tide ebbs and flows, and brought on to the shore thereof within the aforesaid parish." One is left to guess how the expense was incurred. For anything that appears in the order it might have been incurred in washing the body, telegraphing to the relatives, or in many other ways. As to the statement that it was incurred by reason of the body being brought to shore, the Act does not provide for payment of the expense of bringing a body to shore. I do not think that the order states on the face of it facts which shew that the expenses were incurred in or about the execution of the Act. We were referred to the form given in Oke's Magisterial Formulist, but when you look at that form, assuming it to be a good one, it tells distinctly against the contention that this order is good. It differs from the form of this order in two respects; first, because it adds an account of the expenses, which account would shew how they had been incurred; and, secondly, it states that the body has been buried in the parish, which is one of the things the Act contemplates.

I am of opinion that we ought to discharge the rule for a mandamus. The parties must obtain a further and better order before we can discuss the other questions which they wish to raise.

HAWKINS, J. I am of the same opinion. I do not desire to discuss the main question upon which our decision is required, namely, whether the order is bad because it does not shew that the body was buried in the parish. But other objections are taken to the order, and I do not think they are trifling objections, or mere matters of form. I take it to be clear law that every order of magistrates ought to shew on the face of it facts from which the jurisdiction to make the order can be inferred. It is not enough to leave people to guess whether or not the magistrate had jurisdiction. In the present case it was argued that no jurisdiction is shewn by what is stated on the face of the order. Sect. 6 of 48 Geo. 3, c. 75, enables a justice of the peace for the "county or place, &c., in which any such body or bodies

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shall have been so removed and buried as aforesaid," to order the treasurer to pay the expenses to the churchwardens and overseers. Mr. Channell argued that the words "county or place in which any such body or bodies shall have been so removed and buried as aforesaid" were merely descriptive of the justice who was to make the order. I do not think so. Justices are usually described in Acts of Parliament as justices of the peace for the particular county or borough in which they have jurisdiction. In this order there is no suggestion that the body was buried within the jurisdiction of the magistrate who made the order. It is also open to another serious objection. By s. 5 all necessary and proper costs, charges, and expenses "which shall be made or incurred in or about the execution of this Act," shall be made and paid by the churchwardens and overseers; and by s. 6, for the purpose of re-imbursing him or them "all such payments, costs, changes, and expenses" the magistrate may make the order on the treasurers to repay the churchwardens and overseers. The words "such payment, costs, charges, and expenses" in s. 6 refer to the costs, charges, and expenses "incurred in or about the execution of this Act" which are mentioned in s. 5. This order nowhere states that the expenses in respect of which the treasurer is directed to pay the sum named in it were expenses incurred in the execution of the Act, nor does it anywhere state that they were expenses necessarily and properly so incurred. It is clear that the Act does not intend that the order to pay may be made in respect of every expenditure made in or about the finding of a dead body. Sect. 1 states what the churchwardens and overseers shall do where a body has been cast on shore and is lying within the bounds of their parish. They are to "cause the same to be removed to some convenient place, and with all convenient speed to cause such body to be decently interred in the burial ground of such parish, so that the expenses do not exceed the sum which at that time is allowed in such parish for the burial of persons buried at the expense of the parish." Now this order states that the magistrate having inquired into and ascertained on oath the expenses, amounting to 1*l.* 5*s.*, incurred "by reason of a dead human body having been found in the River Thames within the aforesaid

parish, and where the tide ebbs and flows, and brought on to the shore thereof, within the aforesaid parish"—there is not one word there to shew or imply that the expenses were proper and necessary expenses incurred in or about the execution of the Act —the order proceeds to order the treasurer forthwith on sight hereof to pay to the churchwardens and overseers the said sum of 1*l.* 5*s.*, according to an Act passed in the 48th year of Geo. 3, c. 75. In effect, the order says, "because I have inquired into the expenses incurred by the churchwardens and overseers, which expenses I do not find to have been incurred under the Act, therefore I order you to pay them to the churchwardens and overseers." The order may be enforced by indictment, and I am of opinion that in it the jurisdiction of the magistrate ought to be stated, or facts should be stated from which an inference can be drawn by those who have to execute it that the expenses have been incurred in the execution of the Act, so as to give the magistrate jurisdiction. I do not think that the words "according to an Act passed" &c., cure the defect. It is not enough to refer generally to the Act. Facts to shew jurisdiction, or from which it can be inferred, must be stated. They are not so stated in this order, and I am of opinion, therefore, that it is bad, and that this rule must be discharged.

Rule discharged.

Solicitors for the treasurer: *Palmer & Bull, for Scudamore & Brennan, Maidstone.*

Solicitor for the churchwardens and overseers: *Edwin Hughes.*

W. A.

1889
March 18.

[IN THE COURT OF APPEAL.]

DAY AND ANOTHER *v.* McLEA AND ANOTHER.

Accord and Satisfaction—Cheque sent in Satisfaction of Claim—Retention of Cheque on Account.

The plaintiffs having made a claim against the defendants for a sum of money as damages for breach of contract, the defendants sent a cheque for a less amount, stating that it was in full of all demands. The plaintiffs kept the cheque, stating that they did so on account, and brought an action for the balance of their claim:—

Held (affirming the judgment of Charles, J.), that keeping the cheque was not, as a matter of law, conclusive that there was an accord and satisfaction of the claim, but that it was a question of fact on what terms the cheque was kept.

APPEAL from the judgment of Charles, J., at the trial of the action without a jury.

The action was brought to recover damages for breach of contract. The defence was that the plaintiffs had agreed to accept and had accepted 102*l.* 18*s.* 6*d.*, in full satisfaction of all demands in respect of the breach. It appeared that, after the breach, the plaintiffs made a claim on the defendants, who thereupon sent them a cheque for 102*l.* 18*s.* 6*d.*, being less than the amount claimed, stating that it was "in full of all demands," and inclosing a receipt in that form for signature by the plaintiffs. The plaintiffs wrote in reply that they took the cheque on account, and had placed it to the defendants' credit, at the same time inclosing a receipt on account, and asking for a cheque for the balance of the claim. In answer to this letter the defendants wrote stating that the payment was made in full of all demands, and asking for a receipt in full. It was contended on behalf of the defendants that the keeping of the cheque by the plaintiffs was in law an accord and satisfaction of the claim. Charles, J., held that there was no accord and satisfaction, and gave judgment for the plaintiffs.

The defendants appealed.

Firminger, for the defendants. The cheque having been sent upon the condition that it was to be taken in satisfaction, the plaintiffs were bound either to accept it upon the terms on which

it had been sent or to return it. The plaintiffs having accepted the cheque are estopped from saying that it was not kept in satisfaction. In *Croft* v. *Lumley* (1) Lord Campbell, C.J., in delivering the judgment of the Queen's Bench, said, at page 680, "There is an established maxim of law that, when money is paid, it is to be applied according to the expressed will of the payer, not of the receiver. If the party to whom the money is offered does not agree to apply it according to the expressed will of the party offering it, he must refuse it, and stand upon the rights which the law gives him." In the House of Lords Bramwell, B. (2), expressed his concurrence with what Lord Campbell had said, and the other judges, except Crompton, J., agreed, The rule of law solutio accipitur in modo solventis applies. The keeping of the cheque by the plaintiffs amounted in law to an accord and satisfaction. He also referred to *Torrance* v. *Bank of British North America.* (3)

[*W. Willis, Q.C.*, as amicus curiæ, referred to *Miller* v. *Davies.* (4)]

Bosanquet, Q.C., and *Stubbins*, for the plaintiffs. In *Croft* v. *Lumley* (5) the question was as to appropriation of payment and not as to accord and satisfaction. If money is paid as rent it cannot be appropriated to another debt. *Davenport* v. *Reg.* (6) is to the same effect. The rule of law that a payment is to be taken in modo solventis applies only to appropriation of payment, that is to say, to the question which of two accounts is to be credited with the payment. "Accord" implies an agreement. The question, therefore, whether there is accord and satisfaction is a question of fact in each case, and keeping a cheque sent in satisfaction of a claim is not conclusive in law that there has been an accord and satisfaction: *Ackroyd* v. *Smithies.* (7)

Firminger, in reply, referred to *Goddard* v. *O'Brien.* (8)

Cur. adv. vult.

(1) 5 E. & B. 648; in Ex. Ch. 682.
(2) 6 H. L. C. 672, at p. 706.
(3) Law Rep. 5 P. C. 246.
(4) Not reported. Decided by the Court of Appeal, November 10, 1879.
(5) 5 E. & B. 648 and 682; 6 H. L. C. 672.
(6) 3 App. Cas. 115.
(7) 54 L. T. (N.S.) 130.
(8) 9 Q. B. D. 37.

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1889. Mar. 18. Lord ESHER, M.R. This was an action to recover damages for breach of contract. The plaintiffs were claiming a considerable sum as damages, and, before action brought, the defendants sent them a cheque for 102*l.* 18*s.* 6*d.*, being less than the amount claimed, with a form of receipt, to be signed by the plaintiffs, that this sum was accepted in full satisfaction of the claim. The plaintiffs kept the cheque but refused to accept it in satisfaction, and sent a receipt on account. It was contended that the keeping of the cheque so sent was, as a matter of law, an accord and satisfaction of the claim, and that the plaintiffs were bound either to take it in full satisfaction or to return it. The contention, therefore, was that the plaintiffs having kept the cheque must be taken in law to have accepted it in satisfaction. Upon the other side it was contended that the keeping of the cheque could only be evidence of accord and satisfaction, and that whether or not it was taken in satisfaction was a question of fact to be determined according to the circumstances of the case. That argument raises the question whether the fact of keeping a cheque sent in satisfaction of a claim for a larger amount is in law conclusive that there has been an accord and satisfaction. It is said that that inference of law must be drawn even though the person receiving the cheque never intends to take it in satisfaction and says so at the time he receives it. All I can say is that if that is a conclusive inference it would be one contrary to the truth. I object to all such inferences of law. This very question, however, came before this Court in *Miller* v. *Davies*. (1) In that case the action was upon a solicitor's bill of costs for 50*l.*, and there was a plea of accord and satisfaction. Before action the defendant sent the plaintiff a cheque for 25*l.*, with a letter stating that, in order to put an end to the matter, he sent the cheque for 25*l.*, on the terms that the plaintiff would receive it in settlement. The plaintiff kept the cheque and cashed it, and wrote to the defendant that he declined to accept it in settlement and that he required a cheque for the balance. The defendant thereupon wrote in reply requesting the plaintiff to return the cheque if he would not accept it in satisfaction. The jury found that there was no accord and satis-

(1) Not reported.

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faction. It was contended there as in the present case that the fact of the plaintiff keeping the cheque was conclusive in law that he had taken it in accord and satisfaction of the claim, inasmuch as it had been sent in satisfaction and the plaintiff was bound either to keep it upon the terms on which it had been sent or to return it. This Court, however, held that the fact of keeping the cheque was not conclusive in law, that the question was one of fact, and that the jury having found that there was no accord and satisfaction the Court would not interfere. That case is clearly in point. The question, therefore, whether there has been an accord and satisfaction is one of fact. It was for the judge to decide whether the plaintiffs agreed to take 102*l.* 18*s.* 6*d.* in satisfaction of their claim. The learned judge has found that fact in favour of the plaintiffs and consequently this appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. It seems to me, as a matter of principle as well as of authority, that the question whether there is an accord and satisfaction must be one of fact. If a person sends a sum of money on the terms that it is to be taken, if at all, in satisfaction of a larger claim; and if the money is kept, it is a question of fact as to the terms upon which it is so kept. Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing or one of the two persons acting in such a way as to induce the other to think that the money is taken in satisfaction of the claim, and to cause him to act upon that view. In either case it is a question of fact. Therefore, upon principle, as well as upon the authority of the case of *Miller* v. *Davies* (1), which has been brought to our notice, the judgment of Charles, J., must be affirmed.

FRY, L.J. I also agree that the case of *Miller* v. *Davies* (1) is conclusive upon the point of law.

Appeal dismissed.

Solicitors for the plaintiffs: *Stretton, Hilliard & Co., for W. Thomas, Birmingham.*

Solicitors for the defendants: *Perkins & Sawyer.*

A. M.

(1) Not reported.

1889
April 1.

[IN THE COURT OF APPEAL.]

MORRIS *v.* SALBERG.

Execution Creditor—Sheriff—Indorsement on Writ of Fi. Fa.—Direction to Sheriff to levy on particular Goods—Liability of Execution Creditor for wrongful Seizure by Sheriff.

The defendant having recovered judgment in an action against one G. M. M., his solicitor indorsed on a writ of fieri facias, directing the sheriff to levy the amount of the judgment upon the goods of G. M. M., a statement that the execution debtor resided at a certain address, which, however, was not the address of such execution debtor, but that of his father, G. M. The sheriff seized the goods of G. M. the father. In an action brought by G. M. against the defendant, the execution creditor, in respect of such seizure, the jury found that the sheriff seized the goods of the plaintiff instead of those of G. M. M. the son, because he was misled by the direction he received from the solicitor of the defendant:—

Held that, upon such finding, the defendant was liable in respect of the wrongful seizure of the goods.

Jarmain v. *Hooper* (6 M. & G. 827) and *Childers* v. *Wooler* (2 E. & E. 287) considered.

Appeal from the judgment of Stephen, J., at the trial with a jury.

The facts were in substance as follows:—The action was for trespass and wrongful seizure of the plaintiff's goods. The defendant had recovered judgment in an action on bills of exchange against the plaintiff's son, G. M. Morris. A writ of fieri facias directing the sheriff to levy the amount of the judgment upon the goods of G. M. Morris was taken out by the defendant's solicitor, who indorsed the writ, "Levy 170*l.* 16*s.* 11*d.* on the goods of the defendant, &c.: the defendant is a gentleman who resides at Sarnau Park, Llandyssil, Cardigan, South Wales, in your bailiwick." The address so given was the residence of the plaintiff G. Morris, not of his son, who resided elsewhere. The sheriff entered on the premises so described and seized goods of the plaintiff. The learned judge left to the jury the question whether the sheriff seized the goods of G. Morris the plaintiff instead of the goods of G. M. Morris the execution debtor because he was misled by the direction he received from the defendant's solicitor. The jury answered the question in the

affirmative, and assessed the damages at 100*l*. The learned judge, however, on the authority of the case of *Childers* v. *Wooler* (1), entered the judgment for the defendant, notwithstanding the finding of the jury. It was admitted by the defendant's counsel during the argument, as will be seen, that, if a subsequent ratification by the defendant of the act of the sheriff in seizing the plaintiff's goods were possible in law, circumstances existed which amounted to such ratification. It is therefore unnecessary to set out the facts with regard to that point.

Shackleton Hallett, for the plaintiff. The case of *Jarmain* v. *Hooper* (2) shews that the defendant is liable for the indorsement on the writ made by his solicitor; and that indorsement having misled the sheriff into seizing the wrong person's goods, the defendant is liable for his acts in so doing, *Jarmain* v. *Hooper* (2) was stated by the Court of Appeal to be law in *Smith* v. *Keal* (3). *Rowles* v. *Senior* (4) is an authority which shews that such an indorsement has the effect of a direction to the sheriff to seize the goods seized in consequence of it. The learned judge thought that the effect of *Childers* v. *Wooler* (1) was that no such direction to the sheriff could render the execution creditor liable; but the judgment in that case seems to admit that the execution creditor might in such a case be liable if he afterwards ratified the act of the sheriff. Here the course subsequently taken by the defendant amounted to a ratification of the act of the sheriff in seizing the plaintiff's goods. [The plaintiff's counsel was proceeding to argue that the facts shewed such a ratification by the execution creditor, when the defendant's counsel admitted that, if a ratification were legally possible, the facts shewed that there had been one.] The seizure being made for the defendant's benefit, he can ratify it, and, if he does so, will be liable as if he had originally directed it. He also cited *Wilson* v. *Tumman* (5); *Woollen* v. *Wright* (6); *Lewis* v. *Read*. (7)

(1) 2 E. & E. 287.
(2) 6 M. & G. 827.
(3) 9 Q. B. D. 340.
(4) 8 Q. B. 677.
(5) 6 M. & G. 236.
(6) 1 H. & C. 554.
(7) 13 M. & W. 834.

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A. Dunham, for the defendant. The question is, what the effect is of the indorsement on the writ. If that indorsement amounts to a direction to seize the particular goods seized, then clearly the execution creditor is liable. But, if it does not, there can be no subsequent ratification in law, because it is clear that there can only be ratification where the person whose act is alleged to be ratified purported to act as the agent of the person so ratifying. The sheriff, in the absence of directions from the execution creditor, acts in his official capacity as sheriff in performance of the directions of the Court, not as agent of the execution creditor. *Jarmain* v. *Hooper* (1) is no authority that such an indorsement as this is a direction to the sheriff. The question whether that was so was assumed in that case, because that point was not taken, the only point taken being whether the execution creditor was liable for his attorney's act in putting the indorsement on the writ. *Smith* v. *Keal* (2) only affirms *Jarmain* v. *Hooper* (1) on that point. *Childers* v. *Wooler* (3) is an authority distinctly in favour of the defendant, to the effect that such an indorsement is not a direction to the sheriff, and does not throw any liability on the execution creditor. It is merely information given to assist the sheriff, but he is not entitled to act upon it without inquiry: he must make the necessary inquiry whether the information is correct for himself, and the entire responsibility rests with him as the officer charged with the duty of carrying out the directions of the Court.

Shackleton Hallett, was not called upon to reply.

LORD ESHER, M.R. In this case the sheriff was directed by a writ of fieri facias to seize the goods of the judgment debtor, but he has seized the goods of the wrong person. The question is whether the execution creditor is liable in respect of such wrongful seizure. The writ directed the sheriff to seize the goods of G. M. Morris. The execution creditor's solicitor indorsed on the back of the writ a description, which, I apprehend, is no part of the writ, in the following terms: "The defendant is a gentleman who resides at Sarnau Park, Llandyssil, Cardigan,

(1) 6 M. & G. 827. (2) 9 Q. B. D. 340.
(3) 2 E. & E. 287.

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South Wales." The residence so given was not that of the execution debtor but that of his father. The question is whether that indorsement on the writ was a direction to the sheriff or not. The case of *Rowles* v. *Senior* (1) appears to supply the answer to that question. There the indorsement was "the defendant resides at Wolverton, and is an innkeeper," whereas, in truth, the person who kept the inn was the defendant's mother-in-law; and her goods having been seized it was held that that was evidence of a direction to the sheriff to seize them. That case seems to shew that such an indorsement may amount to a direction. The question in any case whether it does amount to a direction to seize the particular goods seized appears to be a question of fact for the jury or other tribunal which has to decide the facts. Therefore we have in this case something indorsed on the writ by the defendant's solicitor, by whose action in making such indorsement the defendant is bound; and, even if it was not meant to be a direction to seize the goods seized, yet I think if it was in such a form as to mislead the sheriff into thinking that it was, the result would be the same: for, if a person makes a statement that may well mislead, and does in fact mislead, the sheriff into thinking that he was directed to seize the goods seized, it seems to me that such a statement renders the maker of it liable as if he had intended to give such a direction. The learned judge at the trial left to the jury the question whether the sheriff seized the goods of the plaintiff instead of the execution debtor's goods because he was misled by the direction which he received from the execution creditor's solicitor. The jury would, in order to answer this question, have to consider whether the direction was intended to point to the particular goods seized or was a direction given in such a form as was likely to mislead the sheriff into seizing those goods. The jury answered the question in the affirmative. The learned judge afterwards came to the conclusion that the result of the decided cases was that nothing indorsed on the writ, whether by the execution creditor or his solicitor, could amount to a direction to the sheriff so as to affect the question of liability for the seizure of the goods. It is difficult to reconcile that conclusion with the case to which I have

(1) 8 Q. B. 677.

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before referred, in which such a direction was held to be evidence of a direction to the sheriff to levy on the goods seized. Another authority to which reference must be made on the subject is *Jarmain* v. *Hooper*. (1) It is true that the point expressly decided in that case was that the execution creditor was bound by what was written on the back of the writ by his attorney, because it was within the scope of the attorney's authority to give the direction: but the terms of the indorsement, which was precisely similar to the one in the present case, were before the Court on the motion for a new trial. The counsel for the execution creditor undoubtedly assumed that such a direction given by the execution creditor himself would render him liable, the point he took being that the direction given by the attorney did not bind the execution creditor, being beyond the scope of his authority. The Court certainly seem to have had their attention called to the terms of the direction in that case, and it would appear from the observations of Maule, J., in the course of the argument that the question as to the effect of the indorsement must have been present to their minds. Under those circumstances, it seems to me that the conclusion at which they arrived really amounts to a decision that such an indorsement on the writ may be equivalent to a direction to the sheriff, and may constitute the sheriff the bailiff of the execution creditor, and that, though it be given, not by the execution creditor himself, but by his attorney, the execution creditor will be liable. It was said that the case of *Jarmain* v. *Hooper* (1) has been overruled by *Childers* v. *Wooler*. (2) The decision being one of the Common Pleas the Queen's Bench can hardly have assumed to overrule it. They did not assume to do so. Cockburn, C.J., in delivering the judgment of the majority, says with regard to *Jarmain* v. *Hooper* (1) that the indorsement in that case was much more specific, and that, as there clearly was a ratification of the illegal seizure which had been made for the benefit of the execution creditor, there was other evidence in that case besides the mere indorsement, and that therefore the point whether the indorsement had the effect contended for by the plaintiff was not raised or decided in *Jarmain* v. *Hooper*. (1) He therefore distinguished that case from the one before him on

(1) 6 M. & G. 827. (2) 2 E. & E. 287.

two grounds. I confess I cannot see any real distinction on the ground of the terms of the indorsement being more specific. Then, with regard to the question of ratification, I think that the defendant's counsel is in a dilemma. He admits that, if such ratification is possible in law, there has been a ratification in this case by the execution creditor of the seizure of the goods. If there cannot be such a ratification in law, then the distinction taken by the majority of the Court in *Childers* v. *Wooler* (1) with regard to *Jarmain* v. *Hooper* (2), on the ground that that case proceeded on ratification, must necessarily fall to the ground. In that case the two decisions would be in conflict: and the question would be which way we are to decide. I think we must take the same view as was taken by the Court of Appeal in *Smith* v. *Keal.* (3) In giving judgment in that case, Jessel, M.R., said, with regard to *Jarmain* v. *Hooper* (2): "That case is not technically binding on the Court of Appeal, but, whether rightly or wrongly decided, it was decided nearly forty years ago and has never been questioned since. It has been frequently cited and commented on, and has got into the text-books, and the Court of Appeal ought not now to disturb it. There are two classes of cases which must be distinguished. Where an old case is contrary to the principles of the general law, the Court of Appeal ought not to shrink from overruling it, even after a considerable lapse of time. But where an old decided case has made the law on a particular subject, the Court of Appeal ought not to interfere with it, because people have considered it as establishing the law and have acted upon it." So if one of the two cases has to be overruled, I think we have the authority of the Court of Appeal for saying that it would be *Childers* v. *Wooler* (1) not *Jarmain* v. *Hooper.* (2) If *Jarmain* v. *Hooper* (2) is not overruled it seems to me to be in point. Lindley, L.J., says, in giving judgment in *Smith* v. *Keal* (3), with regard to *Jarmain* v. *Hooper* (2): "I have often had occasion to consider that case and I do not think it has been shaken by any subsequent decision. Whatever objections to it may have been felt by some judges, it has been taken as good law and has been constantly acted on." The

(1) 2 E. & E. 287.

(2) 6 M. & G. 827.

(3) 9 Q. B. D. 340.

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Court of Appeal in *Smith* v. *Keal* (1) took the distinction that in the case before them the direction was not by indorsement in writing on the writ but by word of mouth after the delivery of the writ. They do not say that such a direction by word of mouth, if given by the execution creditor himself, would not have rendered him liable, but they say that the execution creditor's solicitor can only bind him by a direction given in writing on the writ, and therefore the defendant was not liable in respect of the direction given verbally by his solicitor's clerk. In the present case there is an indorsement on the writ which was evidence for the jury upon the question which was put to them, and they answered that question in the affirmative. I think that their finding brings this case within *Jarmain* v. *Hooper* (2) and that the learned judge ought to have given judgment accordingly. The appeal must, therefore, be allowed and judgment entered for the plaintiff for the damages found by the jury.

FRY, L.J. I am of the same opinion. The principle on which this case must be decided seems to me to be very clearly laid down by Tindal, C.J., in giving judgment in *Wilson* v. *Tumman.* (3) He there says: "If the defendant Tumman had directed the sheriff to take the goods of the present plaintiffs under a valid writ, requiring him to take the goods of another person than the defendant in the original action, such previous direction would undoubtedly have made him a trespasser, on the principle that all who procure a trespass to be done are trespassers themselves, and the sheriff would be supposed not to have taken the goods merely under the authority of the writ, but as the servant of the plaintiff. But when the sheriff, acting under a valid writ by the command of the Court and as the servant of the Court, seizes the wrong person's goods, a subsequent declaration by the plaintiff in the original action ratifying and approving the taking, cannot, upon the distinction above taken, alter the character of the original taking and make it a wrongful taking by the plaintiff in the original action." The question, therefore, is, whether such a direction was given by the defendant in the

(1) 9 Q. B. D. 340. (2) 6 M. & G. 827.
(3) 6 M. & G. 236.

present case as made the sheriff his servant for the purpose of seizing these goods. The indorsement on the writ was relied on for the plaintiff as amounting to such a direction. It was argued for the defendant that the indorsement cannot be regarded as such a direction to the sheriff: and in support of that argument our attention was directed to the case of *Childers* v. *Wooler*. (1) If in that case the Court meant to decide that such an indorsement cannot under any circumstances be regarded as a direction to the sheriff, so as to constitute him the servant of the execution creditor for the purpose of seizing goods, I think the decision was inconsistent with the earlier cases on the subject, such as the case of *Jarmain* v. *Hooper* (2), which was affirmed in this Court in *Smith* v. *Keal*. (3) The Court of Queen's Bench in *Childers* v. *Wooler* (1) took the distinction that *Jarmain* v. *Hooper* (2) does not turn merely on the existence of a direction, but also on the fact that there had been a ratification. It appears to me that this view is inconsistent with *Rowles* v. *Senior* (4), an earlier case: and I think that the distinction so taken is not tenable. In my opinion the defendant's counsel was right in saying that, if a direction was given, no ratification would be necessary, but, if no direction were given, then, as the sheriff in seizing the goods acted as the servant of the Court or the Queen, not of the execution creditor, there could be no ratification by the execution creditor. But, if this be the correct view, it certainly undermines the authority of the case of *Childers* v. *Wooler* (1), and shews that the distinction there taken was untenable. But whether this case is looked at with reference to the decision in *Jarmain* v. *Hooper* (2), or with reference to that in *Childers* v. *Wooler* (1), the result seems to be the same. If *Jarmain* v. *Hooper* (2) be correct, then the indorsement on the writ was a sufficient direction to the sheriff to make the execution creditor liable for his act in seizing the goods, and the case will be governed by that decision. If on the other hand *Childers* v. *Wooler* (1) be right, it follows that subsequent circumstances shewing a ratification would be admissible to fix the defendant with liability, and it is admitted that, if there can be a ratifica-

(1) 2 E. & E. 287.
(2) 6 M. & G. 827.
(3) 9 Q. B. D. 340.
(4) 8 Q. B. 677.

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tion, there was one in this case. The true view appears to me to be that the previous direction of the execution creditor may make the sheriff his servant for the purpose of seizing the goods, and an indorsement on the writ may amount to such a direction, and it is a question of fact whether in the particular case it does so. In the present case the jury have in substance found that the indorsement on the writ did amount to such a direction. No objection has been taken to such finding, and I can see none. I think the judgment ought to have followed the finding of the jury. For these reasons I think this appeal should be allowed.

LOPES, L.J., concurred.

Appeal allowed.

Solicitor for plaintiff: *E. Seymour.*

Solicitor for defendant: *J. T. Watson,*

E. L.

April 2.

THE QUEEN *v.* CUBITT AND OTHERS.

*Fishery Acts—Sea Fishery—Enforcement of Act—Offence against Act—Sea Fishery Officer—Exclusive Right to prosecute—*46 *&* 47 *Vict. c.* 22, *ss.* 4, 11 *—First Schedule, Article* 22.

The Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), creates certain offences, and by s. 11: "The provisions of this Act . . . . shall be enforced by sea-fishery officers," who are defined by that section:—

Held, that the effect of the above words is that no one except a sea-fishery officer can prosecute for an offence against the Act, and a rule calling upon justices to hear and determine a summons for an offence against the Act, taken out by a private individual, discharged.

AN order had been obtained on behalf of Robert Henry Coaker, calling upon William Cubitt, Esq., and certain other justices of the peace for the county of Devon, and James George Hill, to shew cause why the justices should not proceed to hear and determine the matter of a summons, taken out by Coaker against Hill under s. 4 of the Sea Fisheries Act, 1883, and article 22 of the First Schedule to that Act. (1)

(1) 46 & 47 Vict. c. 22. By s. 4: "If within the exclusive fishery limits of the British Islands any person, or if outside those limits any person belonging to a British sea-fishing boat, (a) acts in contravention of articles 13 to 22 (both inclusive) of the First Schedule to this Act, or any of them," . . . . such person is made liable to a fine not exceeding 50*l.* or imprisonment not exceeding three months.

By article 22 of the First Sche-

The information on which the summons was issued stated that Hill, the master of the sea-fishing boat *Violet*, on August 8, 1887, did within the fishery limits of the British Islands, to wit, in Start Bay, unlawfully lift certain gear not belonging to him, to wit, one crab-pot and lines, the property of Coaker, a fisherman, contrary to article 22 of the Convention contained in the First Schedule of 46 & 47 Vict. c. 22.

It was objected on behalf of the defendant that a prosecution under s. 4 of the Sea Fisheries Act, 1883, could only be instituted by a sea-fishery officer, and could not be instituted by any aggrieved person in his own name.

The justices decided in favour of the objection, and dismissed the summons without hearing evidence.

Duke, shewed cause. The offence is created by s. 4 of the Sea Fisheries Act, 1883, and s. 11 points out how it is to be prosecuted, namely, by sea-fishery officers; therefore no one else can prosecute.

[He was stopped.]

J. V. Austin, in support of the rule. It is true that s. 11 contains the words, "shall be enforced by sea-fishery officers," but there are no words prohibiting other persons from taking proceedings. The meaning is that sea-fishery officers shall be bound to enforce the Act in proper cases. Sect. 11 is one of a group of sections headed, "Enforcement of Act," and there is a separate group of sections headed, "Legal Proceedings." This shews that s. 11 does not apply to taking legal proceedings. Sect. 12 shews the meaning of the words, "shall be enforced" in s. 11, for it defines the powers of sea-fishery officers. Sect. 11 is permissive only, and contains no negative words. Sect. 20 makes

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dule: "Except in cases of salvage and the cases to which the two preceding articles relate" (i.e., where nets of different fishermen get foul of each other, or the lines of different boats are entangled), "no fisherman shall under any pretext whatever cut, hook, or lift up, nets, lines, or other gear, not belonging to him."

By s. 11 of the Act: "(1) The provisions of this Act, and of any Order in Council under this Act, or under the sections of the Sea Fisheries Act, 1868, amended by this Act, shall be enforced by sea-fishery officers, either British or foreign." The section then proceeds to define sea-fishery officers.

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the master of a sea-fishing boat liable for offences committed by persons belonging to the boat, but exempts the master if he shews "that he has taken all practicable means in his power to prosecute such offender to conviction:" it is clear, therefore, that a person who is aggrieved can take proceedings.

LORD COLERIDGE, C.J. I am of opinion that this rule ought to be discharged. I will not say what I might have been inclined to hold if the question had arisen under the earlier Act. It is not necessary to determine that point, but I am clearly of opinion that in a case arising under this Act sea-fishery officers, and sea-fishery officers only, can enforce the provisions of the Act. Certain offences are created by the Act, which then goes on to point out who shall enforce its provisions. If any one may enforce the Act, s. 11 is useless. I do not think that negative words are required to exclude proceedings by persons other than sea-fishery officers. For instance, if an Act provided that the Attorney-General was to sue for a penalty, no one else could sue for it; it is obvious that if everyone could sue for the penalty the Attorney-General could sue for it, so that on that view of the statute the clause enabling him to sue would be unnecessary and useless. The same observation applies to this Act, the words of which are direct and clear. It is true that "Enforcement of Act" and "Legal Proceedings" are separate titles to different divisions of the statute, but the terms of s. 11 are exclusive. The words of s. 20 do not support Mr. Austin's contention. The Act, by ss. 11 to 14, having pointed out *who* is to enforce its provisions, goes on to shew, by ss. 15 to 22, *how* they are to be enforced. It is true that s. 20 contains a provision that if the master of a boat shews that he has taken all practicable means to prosecute the offender he shall not be liable himself. Mr. Austin says this means that the owner of the boat is to lay the information, but if that is so, why does not the Act provide that he is to prosecute? The words are intelligible if he has not the power to prosecute; they mean that he must go to the proper authorities, and if he does so, and the sea-fishery officers decline to take any steps, that will be an answer to any charge that may be brought against him. It seems to me, therefore, that if this view is

adopted the words of the statute are reasonable and intelligible, whereas if the other meaning were given to them they would be used in a strained sense, and would be superfluous.

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CHARLES, J. I am of the same opinion. The statute has created a number of new offences by ss. 4, 5, 7, and 9. The next question is, how are these offences to be punished? That is pointed out by s. 11. I agree with the Lord Chief Justice that that section means that the Act is to be enforced by sea-fishery officers exclusively. I also agree that s. 20 does not help Mr. Austin's argument.

Rule discharged.

Solicitors for the prosecution: *Crowders & Vizard, for Windeatt, & Windeatt, Totnes.*

Solicitors for the defendant: *Law & Worssam, for Bond & Pearce, Plymouth.*

P. B. H.

THE QUEEN *v.* THE JUSTICES OF SOMERSETSHIRE.

April 4.

Justices—Practice—Poor Law—Removal of Pauper—Appeal against Order of Removal—Notice of Appeal—Summary Jurisdiction Acts, 1848, 1879, 1884 (11 & 12 *Vict. c.* 43, *s.* 35; 42 & 43 *Vict. c.* 49, *ss.* 31, 54; 47 & 48 *Vict. c.* 43, *s.* 6).

By 11 & 12 Vict. c. 43, s. 35, orders for the removal of paupers are excepted from the provisions of that Act, and therefore the seven days' notice of appeal prescribed by s. 31 of 42 & 43 Vict. c. 49 (which by s. 54 is to be construed as one with 11 & 12 Vict. c. 43, and by 47 & 48 Vict. c. 43, s. 6, is made applicable to appeals from convictions or orders made in pursuance of the Summary Jurisdiction Acts,) is not required on an appeal against an order of removal.

A RULE NISI had been obtained on behalf of the guardians of the Axminster Union for a mandamus commanding certain justices for the county of Somerset to enter continuances and hear and determine on the merits an appeal against an order for the removal of a pauper. The objection taken to the hearing of the appeal was that seven days' notice of appeal had not been given.

Horne Payne, Q.C. (*Douglas Metcalfe*, with him), for the guardians of the Chard Union, shewed cause. Seven days' notice of appeal is required by the Summary Jurisdiction Act, 1879

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(42 & 43 Vict. c. 49), s. 31 (1), which at first only applied to appeals authorized by that or some later Act, but which is made applicable to all appeals by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), which repeals by s. 4 the words "by this Act or by any future Act," which formerly occurred in s. 31 of the Act of 1879, and by s. 6 (2) expressly applies the conditions and regulations of the Act of 1879 to appeals given by earlier Acts. The effect is to repeal by implication the exemption contained in s. 35 of the Summary Jurisdiction Act, 1848 (3), which would otherwise be applicable to the present case.

[He referred to *Reg.* v. *Justices of Montgomeryshire* (4); *Reg.* v. *Shingler*. (5)]

Poland, Q.C. (*C. W. Mathews*, with him), was not called on to support the rule.

LORD COLERIDGE, C.J. The question is whether the old procedure which existed before the Summary Jurisdiction Act, 1879,

(1) 42 & 43 Vict. c. 49, s. 31: "Where any person is authorized by this Act or by any future Act to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such Court, subject to the conditions and regulations following:—

* * * *

"(2.) The appellant shall, within the prescribed time, or, if no time is prescribed, within seven days after the day on which the said decision of the court was given, give notice of appeal by serving on the other party and on the clerk of the said court of summary jurisdiction notice in writing of his intention to appeal, and of the general grounds of such appeal."

By s. 54: "This Act shall be construed as one with the Summary Jurisdiction Act, 1848, so far as is consistent with the tenour of such Acts respectively, and save as aforesaid shall be subject to the exceptions specified in section thirty-five of the Summary Jurisdiction Act, 1848."

(2) 47 & 48 Vict. c. 43, s. 6: "Where a person is authorized by any Act passed before the commencement of the Summary Jurisdiction Act, 1879, to appeal from the conviction or order of a court of summary jurisdiction made in pursuance of the Summary Jurisdiction Acts, or from the refusal to make any conviction or order in pursuance of those Acts, to a court of general or quarter sessions, he shall after the passing of this Act appeal to such court subject to the conditions and regulations contained in the Summary Jurisdiction Act, 1879, with respect to an appeal to a court of general or quarter sessions."

(3) 11 & 12 Vict. c. 43, s. 35: "Nothing in this Act shall extend or be construed to extend to any warrant or order for the removal of any poor person who is or shall become chargeable to any parish, township, or place."

(4) 51 L. J. (M.C.) 95.

(5) 17 Q. B. D. 49.

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with regard to poor-law appeals, is kept alive, for if it is everything has been rightly done in the present case to entitle the Axminster guardians to have their appeal heard. I am of opinion that the old procedure is kept alive. The practice is not altered by Jervis's Act (11 & 12 Vict. c. 43), for orders of removal are expressly excepted by s. 35 from the operation of that statute. The question is not expressly dealt with by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). Therefore if the practice is altered it can only be by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43). But s. 6 of that Act contains an express exception which is applicable to the present case, for it keeps alive the provisions of Jervis's Act (11 & 12 Vict. c. 43). But for one line in s. 6 of the Act of 1884 there might be a good deal to be said in opposition to the rule, but one line in s. 6 is fatal, for that section contains the words "made in pursuance of the Summary Jurisdiction Acts," and orders of removal are expressly excepted from the operation of the Summary Jurisdiction Acts, by s. 35 of Jervis's Act, and therefore they are not within s. 6 of the Summary Jurisdiction Act, 1884.

HAWKINS, J., concurred.

Rule absolute.

Solicitors for Guardians of the Axminster Union: *Geare, Son, & Pease, for W. Forward, Axminster.*

Solicitor for Guardians of the Chard Union: *C. W. Dommett, for Paull, Ilminster.*

P. B. H.

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April 6.

THE QUEEN *v.* THE JUSTICES OF GLAMORGANSHIRE.

Justices—Practice—Excise Law—Appeal from Conviction—Notice of Appeal— 7 *&* 8 *Geo.* 4, *c.* 53, *s.* 83—*Summary Jurisdiction Acts,* 1879 *and* 1884 (42 *&* 43 *Vict. c.* 49, *s.* 31; 47 *&* 48 *Vict. c.* 43, *s.* 6).

The Act of 1827 for consolidating and amending the excise laws (7 & 8 Geo. 4, c. 53), s. 83, required notice of appeal from a conviction under that Act to be given "at and immediately upon the giving of the judgment appealed against."

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, persons authorized to appeal from a court of summary jurisdiction may appeal, subject to the condition of giving notice of appeal, if no time is prescribed, within seven days after the day of the decision.

By the Summary Jurisdiction Act, 1884 (48 & 49 Vict. c. 43), s. 6, a person authorized to appeal by any Act before the Summary Jurisdiction Act, 1879, from a conviction or order of a court of summary jurisdiction made in pursuance of the Summary Jurisdiction Acts, shall appeal subject to the conditions and regulations contained in the Act of 1879.

A person convicted of an offence against the excise laws gave notice of appeal four days after the decision:—

Held, making absolute a rule for a mandamus to justices to hear the appeal, that the effect of the Summary Jurisdiction Acts was to repeal by implication the provision requiring notice of appeal at and immediately upon the giving of the judgment, and therefore no time was prescribed within the meaning of s. 31 of the Summary Jurisdiction Act, 1879, so that by that section the time was seven days, and the notice given was sufficient.

A RULE nisi had been obtained for a mandamus commanding the justices of Glamorganshire to hear an appeal from petty sessions.

On August 20, 1888, the appellant was convicted for selling spirits, beer, and tobacco without a licence. He appealed to quarter sessions, and gave written notice of appeal on August 24.

The justices declined to hear the appeal, on the ground that the appellant had not given notice of appeal "at and immediately upon the giving of the judgment appealed against" within the meaning of 7 & 8 Geo. 4, c. 53, s. 83. (1)

(1) By 7 & 8 Geo. 4, c. 53 (An Act to consolidate and amend the Laws relating to the Collection and Management of the Revenue of Excise), s. 83, on an appeal from the judgment of justices the appellant "shall at and immediately upon the giving of the judgment appealed against give notice in writing of such appeal" to the justices and the adverse party.

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31:

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H. Jeffreys, (*Sir Edward Clarke, S.G.*, with him), for the Commissioners of Inland Revenue, shewed cause. The notice of appeal was not given in time. By 7 & 8 Geo. 4, c. 53, s. 83, it must be given "at and immediately upon the giving of the judgment appealed against." These words are not satisfied by a notice given four days afterwards. That this is so is clear from the provision in the same section requiring the amount of the penalty to be deposited within three days. The Summary Jurisdiction Acts do not alter the time within which notice is to be given. The words of 42 & 43 Vict. c. 49, s. 31, sub-s. 2, specifying a period of seven days, apply only "if no time is prescribed." Here the time is prescribed by 7 & 8 Geo. 4, s. 53, s. 83, which is not repealed, expressly or impliedly, by anything in the Summary Jurisdiction Acts.

Abel Thomas, for the appellant, in support of the rule. The intention of the Summary Jurisdiction Acts was to codify the law as to appeals from the decisions of magistrates exercising summary jurisdiction. This is shewn by the preamble to the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43). The combined effect of 42 & 43 Vict. c. 49, s. 31, and 47 & 48 Vict. c. 43, s. 6, is to make the appeal in the present case subject to the provisions of the former Act, thus impliedly repealing the provision as to notice contained in 7 & 8 Geo. 4, c. 53, s. 83. Therefore "no time is prescribed," and the time is seven days.

"Where any person is authorized by this Act or by any future Act to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such court subject to the conditions and regulations following .... (2) The appellant shall, within the prescribed time, or, if no time is prescribed, within seven days after the day on which the said decision of the court was given, give notice of appeal by serving on the other party, and on the clerk of the said court of summary jurisdiction, notice in writing of his intention to appeal, and of the general grounds of such appeal."

By the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 6. "Where a person is authorized by any Act passed before the commencement of the Summary Jurisdiction Act, 1879, to appeal from the conviction or order of a court of summary jurisdiction made in pursuance of the Summary Jurisdiction Acts, or from the refusal to make any conviction or order in pursuance of those Acts, to a court of general or quarter sessions, he shall, after the passing of this Act, appeal to such court subject to the conditions and regulations contained in the Summary Jurisdiction Act, 1879, with respect to an appeal to a court of general or quarter sessions."

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[The following cases were referred to: *Leech* v. *Lamb* (1); *Morgan* v. *Edwards* (2); *Reg.* v. *Justices of Berkshire* (3); *Reg.* v. *Shingler*. (4)]

LORD COLERIDGE, C.J. The question in this case is whether the notice of appeal was given in time. We have to determine that question on the provisions of three Acts of Parliament, namely, 7 & 8 Geo. 4, c. 53, 42 & 43 Vict. c. 49, and 47 & 48 Vict. c. 43. There was a code of procedure provided by 7 & 8 Geo. 4, c. 53, s. 83, and it is admitted that if the provisions of that section are still in force proper notice has not been given in the present case, for those provisions have not been followed. The question then is whether the procedure provided by that section is still in existence. In the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), the heading of Part II. of the Act is "Amendment of Procedure," and one of the regulations was that "Where any person is authorized by this Act or by any future Act to appeal, &c.," he shall "within the prescribed time, or if no time is prescribed, within seven days," give notice of appeal. A notice which comes within these words was given in the present case. During the period from the commencement of the Summary Jurisdiction Act, 1879, to the commencement of the Summary Jurisdiction Act, 1884, this notice would clearly have been sufficient, for s. 32 of the Act of 1879 contained the words "Where a person is authorized by any past Act to appeal . . . he may appeal . . . subject to the conditions and regulations contained in this Act." By those words both modes of procedure were expressly kept alive. That was the state of the law from 1879 to 1884. During that period the appellant had his choice as to which mode of procedure he would adopt. Then in 1884 the Act of 47 & 48 Vict. c. 43, was passed in order to remove the difficulties caused by diversity of procedure. That deals with s. 32 of the Act of 1879, which was the section which had kept alive the two modes of procedure. The Act of 1884 repeals the provision in that section that persons authorized by past Acts to appeal may appeal subject to the conditions and regulations contained in the Act of 1879, and it also repeals the words "by

(1) 11 Ex. 437.
(2) 5 H. & N. 415.
(3) 4 Q. B. D. 469.
(4) 17 Q. B. D. 49.

this Act or by any future Act" in s. 31. Therefore it destroys the express provisions which gave the double procedure, but it leaves power to appeal in general terms. It is also important to observe the recital contained in the preamble to the Act of 1884, which is as follows: "Whereas the Summary Jurisdiction Acts regulate the procedure before courts of summary jurisdiction and on appeals from those courts to courts of quarter sessions, and it is expedient to provide for uniformity of procedure in all such cases." The result is that, if Mr. Jeffreys's contention is correct, a procedure which was practically uniform under the Summary Jurisdiction Acts was established by the Act of 1879, but the procedure under the other Acts was allowed to stand as well, but, according to his contention, the effect of the Act of 1884 is to repeal the clauses which provided for uniformity of procedure, and to set up in its place a system of complexity. We must interpret the Act broadly, according to common sense, and according to the expressly declared intention of the legislature. I cannot interpret these Acts of Parliament so as to give effect to every word, but my conclusion is that on the whole the true effect and meaning of the Acts (especially having regard to the recital in the preamble to the Act of 1884, and the express enactment contained in s. 6) is to get rid of all other procedure except that provided by the Summary Jurisdiction Acts, and that the notice which was given in accordance with the Act of 1879 was sufficient.

HAWKINS, J., concurred.

Rule absolute.

Solicitors: *Arthur Cheese, for T. W. Garrold, Hereford; The Solicitor of Inland Revenue.*

P. B. H.

1889
March 1.

[IN THE COURT OF APPEAL.]

IN RE HESTER. EX PARTE HESTER.

Bankruptcy—Receiving Order—Rescission—Jurisdiction—Discretion—Consent of Creditors—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 23, 35, 104.

The Court has jurisdiction to rescind a receiving order, even though no scheme of arrangement or composition has been proposed by the debtor under the provisions of s. 18 of the Bankruptcy Act, 1883. But the exercise of the jurisdiction is a matter of discretion, and the order will not be rescinded as a matter of course because all the creditors consent to the rescission. The Court will consider all the circumstances of the case, the interests of the general body of creditors, and the interests of the public, and will be guided by the provisions of s. 35 as to the annulment of an adjudication of bankruptcy.

Ex parte Carr (35 W. R. 150) explained.

Decision of Divisional Court affirmed.

APPEAL against the refusal of the registrar of the St. Alban's County Court to rescind a receiving order which had been made against Frederick Hester. The debtor did not appeal against the receiving order, but he afterwards applied to rescind it, on the ground that all his creditors consented to the rescission. Many of them had given receipts in full for their debts, but it was not pretended that payment in full had been in fact made to them. No meeting of the creditors had been held, but the consent had been obtained by means of applications made by the debtor to each creditor individually.

Winslow, Q.C., and *F. Cooper Willis*, for the debtor.

Muir Mackenzie, for the official receiver.

CAVE, J. I am of opinion that the conclusion at which the learned registrar arrived was undoubtedly right upon the materials before him, and that we ought to arrive at the same conclusion upon the additional materials which have been brought before us.

By s. 35 of the Bankruptcy Act, 1883, an adjudication may be annulled "where in the opinion of the Court a debtor ought not to have been adjudged bankrupt, or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full." This is no express provision with regard to the rescission of a receiving order, but I think that a receiving order must

stand in the same position as an adjudication. I conceive that the Act is intended to be a complete code of bankruptcy, and that the judge is to set aside an adjudication only in those cases in which the Act authorizes him to do so, not in any case in which it may seem to him in his discretion proper to do so. His discretion is limited by the Act. It seems to me that the rule must be the same with regard to a receiving order, and that it cannot be set aside, except in cases in which an adjudication might be annulled. I think also that the Court can rescind a receiving order in cases in which it could annul an adjudication; it cannot be necessary to go to the expense of an adjudication as a preparatory step to its annulment; but the Court may adopt the more direct course of at once rescinding the receiving order.

That being so, there are, in my judgment, only two cases in which a receiving order can be rescinded—when the debts of the debtor are paid in full; and on the ground that the order ought not to have been made in the first instance. The language of s. 35 is somewhat vague, and I think it was intentionally left vague, in order that the Court may be able to do full and complete justice. I do not think it was intended that the application should be made on purely technical grounds, which might or might not have been successful at the time when the order was made, but that the words were meant to apply to larger objections—more equitable objections—such, for instance, as that the matter cannot be successfully worked out in bankruptcy, that the objects of the law of bankruptcy cannot be sufficiently attained by an adjudication, and that there are reasons why, in the interest of all the creditors, and without detriment to the public, the adjudication may be annulled. I think the section gives the Court a very wide discretion.

Now how ought that discretion to be exercised? I am clearly of opinion that it ought not to be exercised simply because the creditors consent. It has never been held that the consent of the creditors alone will justify the Court in annulling an adjudication or rescinding a receiving order. *Ex parte Carr* (1) does, no doubt, contain some expressions which may be twisted in that direction, but I do not think the judges intended to say that the

(1) 35 W. R. 150.

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Court is bound to exercise its discretion in annulling an adjudication, or rescinding a receiving order, simply because all the creditors consent. There the application had been refused by the registrar on the ground that the creditors had not consented, and that their consent if it had been given would have been immaterial; and all, as it seems to me, that the Court of Appeal meant to decide was, that the consent of the creditors was an element for the consideration of the Court, and that, therefore, it was proper that they should have an opportunity of giving or withholding their consent.

I think that the absence of consent by the creditors would in most cases be quite conclusive in favour of rejecting an application to annul an adjudication or to rescind a receiving order, because, the moment the receiving order is made, the creditors acquire a right to have the debtor's assets distributed in a due course of administration in bankruptcy, and it would require very strong grounds indeed to induce the Court to take away that right from them against their consent. Although, therefore, I do not think that the consent of creditors should be disregarded when it is not given, neither do I think that too much importance ought to be attached to it when it is given. It is only one of the elements in the case.

The cases which have been referred to shew that the consent of the creditors ought to be obtained by submitting to them a scheme of arrangement. When such a scheme is submitted to them the creditors have power to assent to it. But their power is only a qualified one. Even with regard to a scheme of arrangement under the Act they have not an absolute power of assent, but the Court before confirming the scheme has to see that the debtor has not been guilty of certain offences under the Act, and also that the arrangement is for the benefit of the general body of creditors. The Court retains a control over the debtor, and the assent of the creditors can only be exercised subject to the approbation of the Court, and subject also to the conditon that the conduct of the debtor does not fall within certain categories in the Act.

If this be so with regard to a scheme of arrangement under the Act, what ground is there for saying that, without any scheme,

they can compel the Court to annul an adjudication or to rescind a receiving order, and let a man, who is unable to pay his debts in full, loose upon the public to continue his trading, without the Court having any right of veto? It is impossible to say that that would not be contrary to the whole scheme of the Act. There may no doubt be circumstances under which the Court may think it right that a receiving order should be rescinded, and the consent of the creditors is a material matter for consideration. But it is not the only thing to be considered. The Court must consider the position of the debtor, the possibility of his getting over his difficulties, and the interests of the public. It is clearly contrary to their interests that a man who is insolvent should be allowed to go on trading. In fact, it is an offence under the Act for a trader to continue trading after he knows that he is insolvent.

If the debtor goes on, the creditors who are aware of his position will put pressure upon him, and their solicitors will get their costs, but the creditors themselves will be no nearer getting paid their debts than they were before. On the other hand, if persons among the public who are ignorant of the debtor's deplorable position, can be found to trust him, then, no doubt, he may raise money by means of which he can pay his existing creditors. But that can only be done by taking advantage of the want of guile of the future creditors who are to trust him. That is really what this proposal comes to. "Let me go on and see if I cannot get some foolish people to trust me; and if I can I shall be able to pay some of my creditors something more than if my business is wound up now." We should not be doing our duty to the community if we were to sanction the rescission of the receiving order. To my mind, this man is hopelessly insolvent. Without any estimate, even by himself, much less by any competent person, of his present position—his assets and liabilities—he asks us to take for granted that, if he is allowed to go on, he will be able to pay his creditors in full. I am perfectly certain that he will not. He will probably succeed in very much enlarging the area of his indebtedness, but I am pretty certain that he will not diminish it.

I am of opinion that the appeal ought to be dismissed.

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CHARLES, J. It is clear that under s. 104 of the Bankruptcy Act, 1883, the Court has jurisdiction to rescind the receiving order. If authority were needed it is to be found in *Ex parte Wemyss.* (1) But the question is, on what grounds ought the Court to exercise that jurisdiction? I agree with my learned Brother that the Court should be guided by the same consideration as would have guided it had there been an adjudication of bankruptcy, and it had been asked to annul the adjudication.

The grounds on which an adjudication of bankruptcy may be annulled are set forth in ss. 23 and 35 of the Act of 1883. It may be annulled under s. 23, upon a composition or scheme being approved by the Court, or it may be annulled under s. 35, when in the opinion of the Court the debtor ought not to have been adjudged bankrupt, or it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full.

In the present case the debts of the person against whom this receiving order was made have not been paid in full. Is it a case in which, if he had been adjudged a bankrupt, the Court would say that he ought not to have been so adjudged? These words undoubtedly are very wide, and many grounds can be conceived upon which the Court might come to the conclusion that a debtor ought not to have been adjudged bankrupt. For example, if there was no sufficient petitioning creditor's debt, or no act of bankruptcy, or if it turned out that the adjudication had been obtained for some sinister purpose, that is, some purpose foreign to the administration of bankruptcy law;—all these are grounds on which the Court might be of opinion that the debtor ought not to have been adjudged bankrupt. But it is argued that the mere fact of the consent of all the creditors having been obtained to the rescission is sufficient. *Ex parte Leslie* (2) decides that it is not; and the same principle was acted on in *In re Gyll* (3), and by the Court of Appeal in *In re Dixon and Cardus.* (4)

Those authorities appear to me to establish that the mere consent of the creditors is not sufficient. It is an element in the case, and probably, if the consent of the creditors were not obtained,

(1) 13 Q. B. D. 244.
(2) 18 Q. B. D. 619.
(3) 5 Morrell Banky. Cas. 272.
(4) 5 Morrell Banky. Cas. 291.

it would be futile to ask to have the receiving order rescinded; but it by no means follows that, if the consent be obtained, the receiving order will, as a matter of course, be rescinded.

I felt a difficulty at first in consequence of the decision in *Ex parte Carr* (1); but in that case all that was done was to direct a stay of the advertisement of the receiving order, in order to see whether the consent of the creditors to its rescission could be obtained. The application had been made to the registrar at a time when the consent had not been obtained, and he declined on that ground to make any order. The Court of Appeal allowed an extension of time, in order to see if the consent of the creditors could be obtained. It does not follow that, if their consent had been obtained, the receiving order would have been rescinded as a matter of course.

In the present case it seems to me, that, notwithstanding the consents which have been obtained under the circumstances which have been detailed to us, it would be wrong to rescind the receiving order.

Appeal dismissed.

The debtor appealed (with leave) to the Court of Appeal.

1889. March 1. *Winslow, Q.C.*, and *F. Cooper Willis*, for the appellants. The Court has jurisdiction under s. 104 to rescind any order made by it. The judgments of the Court of Appeal in *Ex parte Carr* (1) go to shew that a receiving order may be rescinded if all the creditors consent. *In re Dixon and Cardus* (2) is distinguishable. There the petition had been presented by the debtor himself, and a scheme of arrangement was proposed which the Court thought could be carried out under s. 18. No scheme of arrangement is proposed in the present case.

Sir E. Clarke, S.G., and *Muir Mackenzie*, for the official receiver, were not heard.

LORD ESHER, M.R. I think there is hardly any colour for this appeal.

I cannot myself see anything obscure in the judgments in *Ex-*

(1) 35 W. R. 150. (2) 5 Morrell Banky. Cas. 291.

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parte Carr (1), but probably there is, because Cave, J., seems to have thought so. I think that *Ex parte Carr* (1) laid down this, that the rescission of a receiving order is a matter for the discretion of the Court, and, when the registrar, or the judge, or the Divisional Court has exercised the discretion this Court will pause long before it interferes. I think that *Ex parte Carr* (1) also laid down that, in exercising its discretion, the Court of Appeal must in each case have all the facts before it, and it will then upon a consideration of the facts say whether the discretion has or has not been rightly exercised by the Court below. I think that is right. Then we come to *In re Dixon and Cardus* (2), and that seems to me to decide this, that, when a receiving order has been made, and the creditors have not been paid in full, and it is not suggested that the receiving order was wrongly made in the first instance, any proposition for something less than a payment of the creditors in full must be a scheme or arrangement, and, if that arrangement is not in substance an arrangement which would satisfy the requirements of s. 18, the fact that it is possible for the debtor to propose a scheme with all the formalities of s. 18, but that instead of proceeding under s. 18, he asks the Court to rescind the receiving order on the footing of a different scheme, and so to remove the control of the Court, is a very material matter to be considered. But I think that in that case the Court also said that, if the proposed arrangement is equivalent to a scheme under s. 18, and the Court can see that it may with perfect safety be sanctioned, they would not decide that such a proposition must be at once rejected, merely because the formalities imposed by s. 18 have not been complied with. I do not think it is necessary for us to decide that point now. The debtor says that he has obtained the consent of practically all his creditors to the rescission of the receiving order. But he has not obtained that consent in the way pointed out by s. 18, viz. at a meeting of all the creditors, and after a full discussion. He does not propose to carry out the arrangement under s. 18. That is a strong point against him primâ facie. It is urged that he has obtained the consent of all his creditors. But to what has he got their consent? It

(1) 35 W. R. 150. (2) 5 Morrell Banky. Cas. 291

is not pretended that he has paid them in full, although it is said that all, or most of them, have signed receipts in full. If creditors, without getting paid their debts in full, choose to sign a receipt in full, it requires, to my mind, a good deal of explanation how it was that they came to do such an unbusinesslike thing. Such conduct appears to me a badge of folly. The cases are clear that the Court is not bound by the consent of all the creditors. Although the consent of all the creditors has been obtained, the Court will still consider whether what they have agreed to is for the benefit of the creditors as a whole. The Court has gone still further, and I think rightly so, and has said that under the present Bankruptcy Act it will consider not only whether what is proposed is for the benefit of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large; and they will take into consideration the position of the bankrupt with regard to his creditors, and see whether what is proposed will not place his future creditors, who must come into existence immediately, in a position of imminent danger. The Court has said this before, and I adhere to it now.

I am not satisfied that what was done in the present case is for the benefit of the debtor's existing creditors. Neither am I satisfied that there will not—on the contrary, I am satisfied that there will be—imminent and immediate danger to his future creditors, who must at once come into existence if this order is annulled. Therefore, not only am I not prepared to disagree with the Divisional Court, but I think that their discretion was rightly exercised, and I entirely agree with all the reasons given by Cave, J.

I think the appeal must be dismissed.

BOWEN, L.J. I am entirely of the same opinion. With regard to *Ex parte Carr* (1), it is sufficient to say that it did not raise the point which is now raised, but a different point. I wish, however, to add, that I can see nothing in the language used by the Court in that case, read by the light of subsequent cases, in the least inconsistent with what the Master of

(1) 35 W. R. 150.

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the Rolls has now said. But it seems to me that the very point which is now raised, was raised and was decided by the Court of Appeal in *In re Dixon and Cardus.* (1) Even if I doubted the correctness of the decision in that case, I should be bound by it. But, if I may venture to say so, it seems to me that the decision, and the language used in *In re Dixon and Cardus* (1) are absolutely right. What did that case decide? It seems to me to decide, in the first place, that, when the creditors have not been paid in full, and there are no objections to the original validity of the receiving order, it is not enough for the debtor to collect the assents of his creditors, and come to the Court and say, Rescind the receiving order. He ought, if he wishes to move the Court to interfere in a matter which, to a certain extent, is one of discretion, to bring before it some clear grounds for thinking that what is proposed is a bonâ fide proposal, which it will be in the interest of the creditors to uphold. I wish emphatically to add my entire concurrence in what the Master of the Rolls has said, that the proposal ought to be also one which is not detrimental to the interests of the public. Those interests are part of what the Court has to consider upon such applications under the present Bankruptcy Act. A proposal of this kind must, as it is a business matter, take the shape of some scheme or plan. In *In re Dixon and Cardus* (1) the Court stopped short of saying that it was necessary, as a condition precedent, that the proposed scheme should be accompanied with, or based upon, all the formalities prescribed by s. 18; they left that point undecided, and it is not necessary for us to decide it now. I express no opinion upon it. But the Court said that, however that might be, the existence of s. 18 was a matter which the Court could not put aside. That section has provided machinery for dealing with arrangements between debtors and their creditors, and, if a debtor has abstained from taking the benefit of that machinery, the Court would watch narrowly what he was doing, and see whether there was any good reason for his abstaining from taking the benefit of that machinery; and, unless they were satisfied that the plan which he was putting forward was one which, though not exactly based upon the formalities of s. 18, was in substance certain to

(1) 5 Morrell Banky. Cas. 291.

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result in success, they would not interfere with the discretion of the Court below in refusing to act upon it. That is really what *In re Dixon and Cardus* (1) decided. And it seems to me that the facts of the present case demand imperatively, in the interests both of the creditors and of the public, that that decision should be applied now.

FRY, L.J. I am entirely of the same opinion. This appeal is based on the idle notion that the Court is bound by the consents of the creditors obtained, not at a meeting of the creditors, not after a full and open discussion of the rights and interests of the parties and the general position of things, but obtained by the debtor going round to his various creditors, and procuring from them receipts for their debts, or consents to the rescission of the receiving order, upon what representation and in what manner we do not know. It is an idle notion that the Court is bound by the consents of the creditors. The Court has far larger and more important duties to perform than merely to consider whether the creditors have consented to the rescinding of the order. We are bound in the exercise of our discretion in such a matter, and I think I might almost say in all matters under this Act, to take a wider view. We are not only bound to regard the interests of the creditors themselves, who are sometimes careless of their best interests, but we have a duty with regard to the commercial morality of the country.

I conceive that one of the objects of this statute was, if not to put an end to, yet at least to discourage, private arrangements between a debtor and his creditors. Any one who knows the history of the law of debtor and creditor of this country, knows that private arrangements between debtors and their creditors have often been scandalous, and that they have given opportunities for misrepresentation, for private bargains, and for undue preferences. I for one should pause long before I allowed the evils of private arrangements between a debtor and his creditors to creep into the administration of this Act. In my judgment in *In re Dixon and Cardus* (1) I agreed with the Master of the Rolls that we should not lay down that no arrangement with creditors could have

(1) 5 Morrell Banky. Cas. 291.

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effect given to it, unless it proceeded under s. 18. I will not say that now. But I repeat what I then said, that I should hesitate long before I gave effect to an arrangement not made under s. 18, and that for two obvious reasons. On the one hand, the legislature have provided a general mode of proceeding in bankruptcy, and have indicated the securities which are to be required, and the discretions which are to be exercised before any composition or arrangement with creditors is to become binding; and, on the other hand, the evils which attach to private arrangements between debtor and creditor are notorious.

I think that the decision of the Divisional Court was perfectly right, that it was based on the right grounds, and that this appeal must fail.

Appeal dismissed.

Solicitors: *John Nicholls & Co.; Solicitor to Board of Trade.*

W. L. C.

March 5.

THE QUEEN *v.* THE RAILWAY COMMISSIONERS AND THE DISTINGTON IRON COMPANY, LIMITED.

Railway Company—Excessive Charges—Neglect to afford "Reasonable facilities"—Causing "Undue or unreasonable prejudice or disadvantage"—Jurisdiction of Railway Commissioners—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 2—*Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48)—*Prohibition.*

The mere refusal by a railway company to receive and forward the traffic of persons in general except upon prepayment of charges somewhat in excess of the maximum authorized rates is not a denial of "reasonable facilities," nor subjecting the senders of such traffic to "undue or unreasonable prejudice or disadvantage" within the meaning of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2, or the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), and the Railway Commissioners have no jurisdiction under those Acts to restrain a railway company from making such charges, and cannot give themselves jurisdiction by finding as a fact that the demand of prepayment of such charges is a denial of "reasonable facilities" or subjecting persons or their traffic to "undue or unreasonable prejudice or disadvantage" within 17 & 18 Vict. c. 31, s. 2.

RULES calling upon the Railway Commissioners and the Distington Iron Company, Limited, to shew cause why a writ of prohibition should not issue to prohibit them from further proceeding in the matter of a certain order of August 11, 1888.

The Distington Iron Company filed an application to the Railway Commissioners against the London and North Western Railway Company, and the Furness Railway Company, and the Cleator and Workington Junction Railway Company, and complained that the applicants' mineral traffic over the respondent companies' railways was improperly charged a terminal of 2*d.* a ton, and was thereby subjected to an undue prejudice and disadvantage in competition with similar traffic of other works seeking the same markets, and, after alleging facts in support of the complaint, prayed, inter alia, for a restraining order. Answers were filed in denial by the railway companies, who, with the exception of the Cleator and Workington Railway Company, disclaimed any right to charge a terminal.

At the hearing the application was amended by adding a paragraph stating, in the alternative, that the respondents refused to carry the traffic of the applicants except on payment of rates or charges exceeding the maximum amounts which the respondents were entitled to charge, and thereby subjected the applicants' traffic to undue prejudice and disadvantage; and that the applicants had furnished the respondents with particulars of the overcharges on which they relied; they contended that the maximum charge which the respondents were entitled to make was 1½*d.* per ton per mile, and prayed for an order restraining the respondents from continuing so to subject the said traffic to undue prejudice and disadvantage.

Counsel for the railway companies objected that the commissioners had no jurisdiction, inasmuch as the complaint was only of an overcharge, and that as it was not alleged that any other traders or class of traffic had been unduly preferred, or that the applicants were subjected to any prejudice or disadvantage other than the necessity of paying this overcharge, no violation of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2, or of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), was disclosed. They relied on *Great Western Ry. Co.* v. *Railway Commissioners and James Brown.* (1) The Commissioners were of opinion that they had jurisdiction, and heard the case, and made the order of August 11, 1888, by which they found that the

(1) 7 Q. B. D. 182.

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railway companies had refused to carry iron ore of the applicants except on the payment by them of rates in excess of the maximum authorized rates, and had thereby subjected the applicants to undue and unreasonable prejudice and disadvantage, and ordered and enjoined the railway companies to desist from so doing. The pleadings, the decision of the Commissioners, and the terms of the order are more fully stated in the judgment of this Court.

1889. Feb. 25. *Sir R. E. Webster, A.G.* (*R. S. Wright,* with him), for the Distington Iron Company, shewed cause. The Railway Commissioners had jurisdiction to make the order. The jurisdiction given to the Court of Common Pleas by the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 3, was transferred to the Commissioners by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 6. By the Railway and Canal Traffic Act, 1854, s. 2, no railway company "shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsover, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

By refusing to carry the goods of the applicants unless they prepaid more than the maximum rate for the carriage, the railway companies subjected the applicants to undue prejudice and disadvantage. The Commissioners rightly distinguished *Great Western Ry. Co.* v. *Railway Commissioners and James Brown* (1) from the present case. In *Brown's Case* (1) the question was on another clause in s. 2, viz. failure to afford "reasonable facilities," and even there Lord Justices Brett and Cotton suggested that if the overcharges were of such an amount and of such a nature that they had the effect, or it could be presumed that they were made with the intention of preventing the use by passengers of particular trains and stations, the Commissioners might have jurisdiction.

In *Brown's Case* (1) there was no evidence of any tender

(1) 7 Q. B. D. 182.

of the right amount, or that the overcharges were made to prevent passengers travelling, or to stop the running of particular trains. Here the object was to prevent the sending of goods except on the railway company's own terms, and it is found as a fact that insisting on prepayment has deterred traffic.

Sir H. James, Q.C. (*Pope, Q.C., Littler, Q.C.*, and *Ernest Moon* with him) for the London and North Western and Furness Railway Companies. The object of the Railway and Canal Traffic Act, 1854, was to give certain jurisdiction only, and not to oust the jurisdiction of the Courts of Law unless it was expressly so provided. Where the Commissioners have power to hear a case their jurisdiction excludes that of the Courts of Law, and if the Commissioners have power in the present case the jurisdiction of the Courts of Law will be superseded. The case must, for the present, be assumed to be one of overcharges enforced by a threat of refusal to carry unless an overcharge was paid. The remedy was by an action for money had and received, or, if the money was tendered and refused, by an action for not carrying the goods, and perhaps an injunction to restrain the railway company from making the overcharge. The applicants might either have paid, and then sued for the money and for an injunction, or have brought an action for the refusal to carry their goods. The special jurisdiction is given by the Railway and Canal Traffic Act, 1854, s. 2, and by s. 6 "no proceeding shall be taken for any violation or contravention of the above enactments, except in the manner herein provided; but nothing herein contained shall take away or diminish any rights, remedies, or privileges of any person or company against any railway . . . company under the existing law." A "proceeding" in s. 6 includes an action. The applicants must shew that the claim is under s. 2 only, and, if so, must argue that the action for money had and received or for non-carriage is gone. There might possibly be a refusal of facilities by charging some exorbitant sum which would operate as effectually as a physical barrier across the line to prevent the transmission of goods. But this is no such case. There was no evidence of undue preference of one trader or one class of goods over another. If the applicants had paid the sum demanded they would only be "prejudiced" to the extent of having to bring an action for

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the overcharge. Three classes of subjects are dealt with in s. 2: First, "reasonable facilities" for the receiving and forwarding or delivering of traffic, and for the return of carriages, &c. The provision as to that is, on the decided cases, to prevent physical obstruction, and not mere overcharge. Second: giving "undue preference or advantage" to any one; and subjecting any one to "undue or unreasonable prejudice or disadvantage." The latter part is the correlative of the first part of the second provision, expressed negatively instead of affirmatively: see per Bramwell, L.J., *Great Western Ry. Co.* v. *Railway Commissioners and James Brown.* (1) Third, continuous lines. The object of the statute was to put all traders in the same position with respect to the carriage of goods, and to compel the railway companies to carry for all and on equal terms. If they favour one they prejudice another, and vice versâ. *Brown's Case* (2) cannot be distinguished. It was indeed suggested in that case that there might be such a constructive obstruction as would be equivalent to a failure to afford reasonable facilities. But it has not been argued that the demand in the present case could have any such effect.

[He cited also *Bennett* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (3); *Attorney General* v. *Great Northern Ry. Co.* (4)]

Balfour Browne, Q.C. (*McCall,* with him), for the Cleator and Workington Railway Company, referred to the observations of Lord Selborne, L.C., in *South Eastern Ry. Co.* v. *Railway Commissioners* (5), on s. 2 of the Railway Traffic Act, 1854; and contended that on the applicants' own case it appeared that no excessive charge had been made by the Cleator and Workington Railway Company.

Cur. adv. vult.

1889. March 5. HUDDLESTON, B. I am of opinion that the rules should be made absolute. The Distington Company applied to the Railway Commissioners to act under s. 2 of the Act of 1854, because the power to deal with these questions was

(1) 7 Q. B. D. at p. 193.
(2) 7 Q. B. D. 182.
(3) 6 C. B. (N.S.) 707.
(4) 29 L. J. (Ch.) 794.
(5) 6 Q. B. D. 586, at pp. 591–2.

given to the Court of Common Pleas by the Railway and Canal Traffic Act, 1854, and then that power was transferred to the Railway Commissioners by the Regulation of Railways Act, 1873. The 2nd section of the Act of 1854 is in substance re-enacted in the Act of 1873, with some additions, but for convenience we may refer to the section as it appears in the statute of 1854. "The first observation which arises upon this enactment," said Lord Selborne in *South Eastern Ry. Co.* v. *Railway Commissioners* (1), "is, that it does not enable the Commissioners to impose upon a railway company any new duties or obligations depending upon any mere exercise of the Commissioners' own judgment. Their authority is only to enquire into and to prevent violations or contraventions of the statute"; and in *Great Western Ry. Co.* v. *Railway Commissioners and James Brown* (2), Bramwell, L.J., said: "I think one ought not to suppose that the legislature intended to give to the Commissioners a jurisdiction in matters which could be quite as well exercised by the ordinary Courts of Justice." Those observations shew that the Commissioners have no authority except that which is given them by the statute, and that where there is power in the ordinary Courts of Justice to afford redress it is not probable that the Commissioners would have jurisdiction.

What, then, is submitted to their jurisdiction under s. 2 of the Railway and Canal Traffic Act, 1854? The first part relates to reasonable facilities for receiving and forwarding the traffic. The second part of that section is all one, as Sir Henry James pointed out; it is not two as the Attorney General suggested, but it is with reference to giving undue or unreasonable preference or advantage, or causing undue or unreasonable prejudice or disadvantage in any respect whatsoever. The terms are "preference and advantage," "prejudice and disadvantage," correlative terms. Then the third part is with reference to continuous lines of communications and railways. That is not my view of it only, but that is the view which the late Lush, J., took in *South Eastern Ry. Co.* v. *Railway Commissioners* (3), and was the division approved of by Lord Selborne in his judgment in

(1) 6 Q. B. D. 586, at p. 591. (2) 7 Q. B. D. 182, at p. 193.
(3) 5 Q. B. D. 217.

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that case in the Court of Appeal. (1) Those are the three heads—first, facilities; second, preference and advantage or disadvantage; and third, continuous lines—over which the legislature gives the Railway Commissioners jurisdiction and power. Before I read the words of s. 2, let me see what was the application of the Distington Iron Company; and it is remarkable how vague and how inconclusive the pleadings are.

The original application referred principally to terminal charges; and in particulars given by the Distington Iron Company they undertook "not to call any evidence in support of the complaint contained in the second paragraph of the application that the applicants' traffic is subjected to any undue prejudice and disadvantage in competition with similar traffic of other works," and although that may only apply to the second paragraph which is with reference to terminal charges, it clearly shews that any question of the traffic being subject to undue prejudice and disadvantage in competition with similar traffic of other works was abandoned by the applicants. I should think that when the Distington Company found themselves in a stress by the terminal charges being disclaimed, and a question of costs arose, they sought to get the Commissioners to add the amendment; and it is the more remarkable, because in the answer by the London and North Western and the Furness Company, and in the subsequent answer in the same terms by the Cleator and Workington Junction Railway Company, they deny the statement that the applicants' traffic or any is charged with a terminal, or that the applicants are subject to any undue prejudice or disadvantage. Those were the two charges made, terminals and undue prejudice and disadvantage with reference to the terminals, not with reference to anything else. There is nothing said about being exposed to greater charges, or being prejudiced because there are greater charges. I find that when the Distington Company reply to the answer of the railway companies, they join issue and say "that the respondents have charged, and continue to charge to the applicants, rates exceeding the maximum rates which the respondents are entitled to charge"; and, "if the said charges cannot be justified as

(1) 6 Q. B. D. 586, at pp. 591-2.

including terminals at Distington, they cannot be justified at all." It is conclusive to my mind that what they meant in the reply was this:—True, terminal charges are disclaimed, but we rely upon excessive charges—not excessive charges as suggested afterwards by the Railway Commissioners, but—excessive charges generally. If I am right in supposing that was the real question, there cannot be a doubt that the Railway Commissioners have no jurisdiction whatsoever, for *Brown's Case* (1) decided that the question of excessive charges was not a question for the Railway Commissioners, because the parties would have their remedy in the courts. If the railway charges were excessive they could go into the county court or the superior court, and recover the surplus; or if such charges were only threatened, the parties could go into the courts and obtain an injunction.

When the case came before the Railway Commissioners there was obviously a disinclination on their part to recognise *Brown's Case* (1), and they seem to have struggled to escape from the effect of it. The only question on the replication was the issue of excessive charges, and the Commissioners gave the go-bye to that; and it would puzzle anybody to ascertain from their decision whether they proceeded upon the first or on the second part of the 2nd section, because at one time they base their decision upon "facilities," at another time they base it upon "prejudice and disadvantage." Then they come to a conclusion, which in substance says, We do not decide upon the pleadings as they originally stood, but we decide upon the addition or rider to the pleadings. [The learned judge read it.]

But before I examine the judgment of the Railway Commissioners, let me see what is the real meaning of the 2nd section according to my humble judgment. I dismiss the third part, because the question of continuous lines does not arise at all. The first is the question of facilities. "Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of

(1) 7 Q. B. D. 182.

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carriages, trucks, boats, and other vehicles." What is the meaning of "facilities"? It is clear that the word has no reference to excessive charges at all, but is used with reference to the convenience to be afforded in receiving and forwarding and delivering traffic, and so on, and the return of carriages; and that that is the right view appears from the judgment of Brett, L.J., in *South Eastern Ry. Co.* v. *Railway Commissioners* (1) when speaking of facilities, he said, "Their jurisdiction"—that is the Railway Commissioners' jurisdiction—"was further confined to this, that they could only properly deal with matters which might facilitate or impede the receiving, forwarding, or delivering of passengers or goods upon or from the existing railways or stations; they had no jurisdiction to entertain or deal with matters otherwise affecting passengers and goods." And in *Great Western Ry. Co.* v. *Railway Commissioners* (2), Cotton, L.J., said: "Now, what I think comes within those words 'afford all reasonable facilities,' is the providing proper accommodation in the stations and in the carriages for the receiving and forwarding passengers, and for getting them in and out of their carriages and the like. The mere fact that the charge is beyond that which parliament has sanctioned is not, in my opinion, a refusal to afford reasonable facilities. It may be the charges are so excessive," and so on. Those two authorities shew that upon a question of excessive charges the authority of the Railway Commissioners on this portion of the Act—namely, as to the reasonable facilities—cannot be imported. That being gone, now let me see what is the only portion of the Act upon which they can act. That is the second: "And no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Those words, "undue or unreasonable preference or advantage," and "prejudice or disadvantage," must, as it appears to me, mean a preference or a prejudice with reference to competing parties—an inequality, an

(1) 6 Q. B. D. 586, at p. 600. (2) 7 Q. B. D. 182, at p. 196.

unfairness, with reference to others, or a prejudice to other works, and cannot mean that because there are excessive charges a prejudice arises to the applicants, for that is all that remains. All that the applicants can say here is—you charge us too much, but we dare not say that, because *Brown's Case* (1) is decisive; therefore we will say you prejudice us because you charge us too much. Then they try to avail themselves of a very refined distinction, saying that in effect the overcharge is a refusal to carry, and therefore they are prejudiced—I will deal with that presently—and they try to do so in consequence of some dicta of Brett and Cotton, L.JJ., in *Brown's Case* (1), but I fail to see anything in those dicta to support that proposition. Brett, L.J., says: "If there were a statement in the complaint that the overcharge was done with the intent to stop the running of a train or prevent a certain number of trains going, as at present advised I should think it was a matter within the jurisdiction of the Railway Commissioners" (at p. 196). I should myself doubt whether it was so. If, however, this had been a decision of the Lord Justices I should have felt bound by it; but it is not, it is obiter dictum. To the same effect is a passage to be found in Cotton, L.J.'s, judgment. But that is a very different thing to anything that has been found here. I dare say if the Railway Commissioners had had their attention called to that, they might just as well have arrived at the conclusion that the alleged overcharge was done with intent, as at the conclusion they have arrived at—namely, that it was done to prejudice.

I look at the judgment of the Railway Commissioners. Sir Frederick Peel left the question of law to the legal Commissioner, now Sir Alexander Miller. That learned Commissioner said: "In this case the presence of those allegations upon the absence of which the judges relied in that case" (that is referring to *Brown's Case* (1)), "is sufficiently alleged. It appears that the applicants not only remonstrated against the charges as excessive in themselves, but as calculated to injure their business, that they formally announced in writing their intention not to pay more than the legal charges, and that thereupon the companies told them that unless that letter was withdrawn, they would not

(1) 7 Q. B. D. 182.

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receive or carry the traffic." That certainly is contrary to the evidence; there is nothing in the evidence to say that it was calculated to injure their business, and so on. "This, in our opinion, amounted to a distinct tender by the applicants, and refusal by the company, of the sums alleged by the former to be the proper amounts." I do not think it does. He referred to two letters, and those two letters when read will not support this suggestion. "Of course, in considering the question of jurisdiction, we must assume the allegations to be true. Now, we are clearly of opinion, and the observations of the judges in *Brown's Case* (1) serve to point to the same conclusion, that a refusal to receive and carry traffic except upon terms which the company are not warranted in exacting, is a denial of reasonable facilities within the meaning of the Act. And is also, when the sender of the traffic is thereby injured or inconvenienced in the conduct of his business, an undue prejudice and disadvantage to such sender." How does he make that out? No doubt if the railway companies require certain charges which are more than legitimate charges, and the sender refuses to pay them, he may be prejudiced by that; and so was Brown. "And from the character of this prejudice there is an obvious distinction between passenger and goods traffic. It may very well be that as to the former all that is required in the way of facilities is that proper carriages should be provided, and trains despatched at convenient times, and at reasonable rates of speed, because, as to all other matters, the passenger can help himself"—I do not understand that exactly, because passengers and goods are placed on the same footing—"but in the case of goods all that a sender can do is to deliver or offer the traffic to a company, and if they refuse to receive it, or, receiving, duly to forward it, he is as completely denied reasonable facilities for its transmission as if the company had wilfully neglected to provide the physical appliances necessary for its business." Now has the learned Commissioner decided upon the ground of reasonable facilities, or has he decided upon the ground of advantage or disadvantage, preference or prejudice. It is impossible to tell. I look first, therefore, to see what is the order that is drawn up. The order recites that terminal

(1) 7 Q. B. D. 182.

charges are disclaimed, and then that the applicants obtained leave to amend their application; and then the amendment is stated: "Whereby the applicants alleged that they and their traffic were subject to undue and unreasonable prejudice and disadvantage, and prayed for an injunction restraining the respondents from continuing to subject their traffic to such undue prejudice and disadvantage." Then the Commissioners "Find and determine that except as to iron ore, the said railway companies do not subject the applicants or their traffic to any undue or unreasonable prejudice or disadvantage. And as to the iron ore we find that the said railway companies have refused to carry such traffic for the applicants to their works at Distington, except on the payment by the said applicants to the said railway companies for the conveyance of such traffic, of rates or charges in excess of the maximum rates which the said railway companies respectively are authorized to charge for the conveyance of such traffic"—that is *Brown's Case* (1)—"and have threatened to refuse such traffic for conveyance on their railways except upon prepayment of such excessive and illegal charges." What is really the meaning of that except that the railway companies have made excessive charges? That may be the case, but that is all that it amounts to. Then it is said that because those excessive charges are claimed there is an undue prejudice or an undue disadvantage to the applicants. "And we order and enjoin the said railway companies, and each of them respectively, to desist from subjecting the said applicants to such undue and unreasonable prejudice and disadvantage as aforesaid." I must come to the conclusion that the Railway Commissioners, finding they could not base their judgment upon the question of facilities, have set up this second part of the case—the preference or advantage, prejudice or disadvantage; and, for the purpose of giving themselves jurisdiction, have found that the excessive charges are a prejudice and disadvantage. That is the meaning of it. No Court can give itself power. It cannot give itself jurisdiction by a finding which is not a proper finding; and in this case it appears to me that the whole substance of the application of the Distington Iron Company was a last resource. Their first

(1) 7 Q. B. D. 182.

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complaint was of terminal charges; when those were explained they were put out of court; and when, to recover themselves, they based their whole case on excessive charges, they were met by *Brown's Case* (1), and tried to get rid of that by urging that there was a letter written which might have had the effect of preventing people sending goods by the railway, and therefore there was a prejudice or disadvantage. It is, in substance, saying there is a prejudice or disadvantage from the excessive charges. This is the real meaning and the real finding. That is bad, being directly opposed to *Brown's Case* (1); and I am therefore of opinion that this prohibition must go, and go on the ground that the Railway Commissioners had no jurisdiction to entertain this question, because the Distington Iron Company have their ample remedy in the courts of justice.

MANISTY, J. I am also of opinion that these rules must be made absolute. The question is simple, whether or not the Railway Commissioners had the power to make the order which they did make on August 11, 1888. No doubt there had been amendments and variations of the complaint, but in the result it came to one simple question, whether or not the alleged overcharge by the railway companies, not upon one individual, but upon all who were using that part of the line, was within the Act of 17 & 18 Vict. c. 31—whether or not, if a railway company make an alleged excessive charge, that is a question to be tried in the Queen's Bench Division, or perhaps in the Chancery Division, of the High Court of Justice. It is a question of law, coupled, no doubt, with fact, but the fact is simply that the railway company has sought to charge more than the maximum rate allowed. All the rest, in this case, is out of the question. No doubt Sir Frederick Peel went into a number of questions, but he left the law to the learned commissioner, now Sir Alexander Miller. He says: "We are clearly of opinion, and the observations of the judges in *Brown's Case* (1) serve to point to the same conclusion, that a refusal to receive and carry traffic except upon terms that the company are not warranted in exacting is"—what?—"a denial of reasonable facilities within the meaning of the Act, and

(1) 7 Q. B. D. 182.

is also, when the sender of the traffic is thereby injured or inconvenienced in the conduct of his business, an undue prejudice and disadvantage to such sender."

That is the ground of the decision, and the order made upon it is, "We find that the railway companies have refused to carry, except on the payment by the applicants to the railway companies of rates and charges in excess of the maximum rates which they are authorized to charge, and that the railway companies thereby subject the applicants to undue and unreasonable prejudice and disadvantage." There is not a word there about facilities. "And we order and enjoin the said railway companies, and each of them respectively, to desist from subjecting the applicants to "—what?—"to such undue and unreasonable prejudice and disadvantage." But, according to the authorities, that is not a question which they have a right to try. This is a question to be tried in the ordinary way by the ordinary tribunals. The mere charging of an alleged excess—the railway companies say it is not an excess, the applicants say it is—is a question which it has been decided over and over again is not the subject of an order by the Railway Commissioners. It may be of assistance in dealing with similar cases if we look at the way in which the Court of Common Pleas dealt with this sort of case after the Act passed. There the law was clearly defined, and not only defined, but it was held by learned judges that such a question of an excessive charge upon all who are sending on traffic on a railway is not within the jurisdiction of the Railway Commissioners—it was not within the jurisdiction of the Court of Common Pleas, and not being within the jurisdiction of the Court of Common Pleas, it cannot be within the jurisdiction of the Commissioners.

[The learned judge referred to *In re Caterham Ry. Co.* (1); *Ransome and Geard* v. *Eastern Counties Ry. Co.* (2); *In re Harris and Cockermouth Ry. Co.* (3)]

Then there is the opinion of the late Cockburn, C.J., and Byles, J., as to when the Act applies. It had been stated in former cases, that if there was a remedy, otherwise than by going

(1) 1 C. B. (N.S.) 410. (2) 1 C. B. (N.S.) 437.
(3) 3 C. B. (N.S.) 693.

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to the Commissioners, you must resort to that remedy, and in *Bennet* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1), at p. 714 Cockburn, C.J., says: "Why not proceed by the remedies you had before the passing of Mr. Cardwell's Act? I cannot think the statute was intended to apply where a remedy before existed." I can refer to several cases in which he made the same observations. Then Byles, J., said this Act "refers to preferences given to one person or class of persons over another in the traffic along the same railway or canal," (at p. 715). It had no reference, therefore, to one navigation and another, or two different railways. Willes, J., always held the same opinion, and I would refer to cases in which he said that if an indictment could lie or an action could be maintained that concludes the question, and it is not a case within the jurisdiction of the Railway Commissioners, for this reason, that railways and canals had given rise to a new state of things, which required new remedies. Many things in the shape of preference and undue advantage, and so on, were not the subject of any proceeding, either criminal or civil, and in order to meet those cases, powers were given to the Railway Commissioners to arrange as to traffic and as to giving facilities for traffic, and as to preventing undue prejudice and undue favour to different parties. The object of the Act was to provide for cases in which there was on remedy; and if the Railway Commissioners keep that in view, as I daresay they will in future, there will be no question.

The first question, therefore, always is: Is this a case in which you can bring your action? If it is, bring your action. The question of excessive charge is the subject of an action; *Brown's Case* (2) is precise upon it, and exactly in point. Then there was *Pryce* v. *Monmouthshire Canal and Ry. Co.* (3), which is a very important case, because it involved a question of charging what was said to be an excess, and also a charge for stopping and a charge for terminals. Nineteen actions were brought, and they were consolidated and a case stated. That case came before the Court, and went to the Exchequer Chamber, and to the House of Lords, and all these questions of excessive charges, stoppage, and

(1) 6 C. B. (N.S.) 707. (2) 7 Q. B. D. 182.
(3) 4 App. Cas. 197.

terminals were treated as matters to be dealt with in the ordinary way by action, and the House of Lords held that a charge for stoppage was legal and a terminal. I only mention it as shewing there is no doubt that all these questions are questions to be tried in the ordinary Courts, and, if they are, in my humble opinion they are not within the jurisdiction of the Railway Commissioners.

Rules absolute.

Solicitors for the London and North Western and Furness Railway Companies: *C. H. Mason; Currey, Holland & Currey.*

Solicitors for the Cleator and Workington Railway Company: *Rowcliffes, Rawle, & Co.*

Solicitors for the Distington Iron Company, Limited: *Johnston, Harrison & Powell.*

J. R.

[IN THE COURT OF APPEAL.]

Jan. 23; *Feb.* 6.

BYRNE AND ANOTHER *v.* BROWN. DIPLOCK, THIRD PARTY.

Practice—Parties—Adding Defendants—Right of Third Party to object—Order XVI. r. 11.

The lessee for a term of years under a lease containing a covenant to repair agreed with D. to sell and assign to him the residue of the term, he undertaking to indemnify the lessee, without mentioning her assigns, in respect of any breach of covenant. D. entered into possession under that agreement, but no deed of assignment to him was executed, and upon the lessee's death her executors, having distributed her estate, assigned for a nominal consideration the residue of the term to her son, who thenceforth received the rent from D. and paid it to the lessors. At the expiration of the term the lessors sued the son for breach of the covenant to repair, and he claimed indemnity from, and brought in, D., as third party. The action was referred to an official referee, who, upon the application of the defendant, made an order adding the lessee's executors as defendants in order to enable them to claim indemnity from D. Neither the plaintiffs nor the executors objected to this order being made, but D. opposed it:—

Held, upon these facts, that the official referee in adding the executors as defendants rightly exercised his discretion under Order XVI. r. 11.

APPEAL from a decision of the Queen's Bench Division rescinding the order of the official referee adding two defendants in the action.

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By a lease of November 28, 1868, the plaintiffs demised certain premises for a term of years to Margaret Elizabeth Brown, and the lessee covenanted for herself, her executors, administrators, and assigns, to repair and keep in repair the demised premises.

In 1876 the lessee entered into an agreement with S. Diplock to sell and assign the residue of the term to him for the sum of 1000*l.*, to be paid by five yearly instalments of 200*l.*, Diplock to be entitled to have a deed of assignment executed when all the instalments were paid; and Diplock agreed to perform the covenants in the lease, and to indemnify her (but there was no mention of her assigns) in respect of any breach of the covenants contained therein.

Diplock entered into possession under that agreement, and paid all the instalments, but no deed of assignment was ever executed.

Margaret Elizabeth Brown died in November, 1882, and the executors of her will, having distributed her estate, executed an assignment of the lease to her son, Stanley Brown, for a nominal consideration of 10*s.*

Stanley Brown thenceforth, until the lease expired in March, 1887, received the rent from Diplock, and paid it over to the plaintiffs.

Upon the expiration of the lease the plaintiffs brought an action against Stanley Brown to recover damages for breach of the covenant to repair, and he thereupon applied for and obtained from a master an order bringing in Diplock as a third party, and directing that the question of indemnity as between Diplock and the defendant should be tried after the trial of the action, and pursuant to Order XVI., r. 53, the third party to be at liberty to appear at the trial, and to oppose the plaintiffs' claim so far as he might be affected thereby.

All questions and issues in the action were referred to an official referee, with all powers of certifying and amending of a judge of the High Court, and with power to direct judgment to be entered, and otherwise to deal with the whole action.

At the hearing before the official referee he was of opinion

that, as Diplock's agreement to indemnify Margaret Elizabeth Brown did not extend to her assigns, he was not liable to indemnify the defendant, and upon the application of the defendant the official referee made an order adding her executors as defendants in the action.

Neither the plaintiffs nor the executors opposed that order, but Diplock opposed it, and appealed to the Queen's Bench Division.

1889. Jan. 23. *R. Henn Collins, Q.C.* (*Upjohn,* and *A. E. Randall,* with him), for the appellant. The order of the official referee was made without jurisdiction. Even if Order XXXVI., r. 50, giving him the same authority "in the conduct of any reference or trial as a judge of the High Court" extends to the addition of parties, Order XVI. r. 11, did not enable him to join as defendants in the case persons whom the plaintiffs did not choose to sue, and against whom they probably have no cause of action. The executors of the lessee have duly assigned the lease, and are not personally liable: 22 & 23 Vict. c. 35, s. 27. The plaintiffs' right against them, if any, is, however, not "involved in the action" within the meaning of the rule: *Norris* v. *Beazley.* (1)

Raven, for the defendant Brown. The lessee in her lifetime made an equitable assignment of the lease to Diplock, who has had possession of the premises. Her executors are liable, and if they had been originally joined as defendants could not have been properly struck out. The official referee clearly had power under Order XXXVI. r. 50, to make the order, and could not do justice without making it. 22 & 23 Vict. c. 35, s. 27, does not relieve the executors from liability, because they have not "set apart a sufficient fund to answer any future claim," and, moreover, the assignee on payment of the nominal consideration for the assignment did not become a "purchaser" within the meaning of the Act. The rights and liabilities under the equitable assignment must at some time be decided, and ought to be decided in this action. In *Norris* v. *Beazley* (1) Denman, J., said: "I think there may be cases where, though a person is not within the scope of the plaintiff's attack in the first instance, he

(1) 2 C. P. D. 80.

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ought to be introduced as a defendant to enable the Court to settle all the questions involved in the action." (1) There the plaintiffs resisted the joinder, but here they do not, and they are indemnified against the costs.

Shiress Will, Q.C., for the plaintiffs, neither assented to nor resisted the application, provided they were not damnified by being detained unduly at the trial.

R. Henn Collins, Q.C., in reply. The position of the parties is this. The lessee was, of course, liable to the lessors on the covenants in the lease. She agreed to assign to Diplock, but did not assign by deed, and therefore he is not liable either by covenant or by privity of estate, although such rights as might be conferred without deed still exist. After her death her executors, being liable to the lessors, legally by deed assigned the term to the defendant Brown, so that on all covenants running with the land he is clearly liable to the lessors, and they sue him upon them. He introduced Diplock as a third party, but there is no covenant and no relationship of landlord and tenant between Brown and Diplock, and therefore the defendant, seeking to get out of the difficulty, suggests that if the plaintiffs sued the executors of the lessee the executors might have a remedy over against Diplock. But the defendant has no right to bring in another defendant merely to get an indemnity. The plaintiffs have chosen to sue on what they deem a good cause of action against a particular person, and there is no reason why the plaintiffs' rights against the executors of the lessee should be determined in this action. They were under no joint liability, and therefore were not persons who "ought to have been joined" as in *Pilley* v. *Robinson* (2), nor is their presence "necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action" within Order XVI., r. 11. In *Harry* v. *Davey* (3) there was a question in which all the parties might be interested, but as it was not the question in the action a motion to add some interested parties was refused. Although *Norris* v. *Beazley* (4) may not be exactly in point, the principle enunciated applies—that a defendant is not to be added

(1) 2 C. P. D. at p. 85.
(2) 20 Q. B. D. 155.
(3) 2 Ch. D. 721.
(4) At page 84.

"merely for the convenience of another defendant." In *Kino* v. *Rudkin* (1) a person to whom the defendant had assigned his interest pendente lite was added as co-defendant, but there it was obviously necessary for the purposes of an injunction, which would otherwise have been useless.

DENMAN, J. The question is, whether the order made by the official referee that the two executors of Mrs. Brown should be added as defendants, is one which the official referee had jurisdiction to make. If he had jurisdiction to make it, I think, under the circumstances, we should not interfere, because, where the rule applies, it is a matter of discretion. It has been held in many cases that the Court may in its discretion grant or refuse an application to add a defendant. The first point made, but not much insisted on, was that the official referee was not in the position of the Court or a judge. But I think that—applying the provisions given by other rules to which I need not refer in detail—the official referee had power to deal with the matter if it fell within Order XVI., r. 11. I do not, however, think that we are in a position to hold that the official referee had power to do what he has done within the rule. I confess that the doubt I had in *Norris* v. *Beazley* (2) is not altogether removed. I think it is still a question whether in some cases where an action well founded on the pleadings as they stand, and not encumbered by any such considerations as arise with respect to pleas in abatement, is brought against certain persons, the defendant would not be entitled under this rule to have another defendant added in order that all questions which may be decided in that action may be raised, and by bringing all parties before the Court expense may be saved and justice between all parties to the transaction done. I will not say that there may not be cases in which that might not be bringing in a fresh defendant "whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions *involved* in the cause." It is not necessary to say whether this is such a case. But I think that *Norris* v. *Beazley* (2) clearly decides that,—subject to such cases as those which have

(1) 6 Ch. D. 160. (2) 2 C. P. D. 80.

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been cited, in particular *Pilley* v. *Robinson* (1), and others which may be conceived in which the parties are so necessarily mixed up in the transaction that justice cannot be done by judgment against one without having the other person made party to the action—one defendant cannot bring in another merely for his own convenience. It may be said that I am taking too strong a view of that case, for there the plaintiff objected, and here the plaintiffs do not, and are quiescent, but I do not think that this makes a distinction in the principle laid down, and that principle laid down in *Norris* v. *Beazley* (2) by the Lord Chief Justice and Grove, J., is that where a plaintiff, acting within his right, has chosen to bring an action against any person, and has made him defendant, and there is no objection on the face of it to the action which has been brought, the defendant cannot say "That action ought not to have been brought against me because it ought to have been brought in whole or in part against some one else," and be therefore entitled to bring in that other person against his will, the plaintiff neither assenting or dissenting. I do not think the case comes—according to the decision in *Norris* v. *Beazley* (2)—within the words of r. 11: "The Court or a judge"—here we may read in official referee—" may at any stage"—and this stage is not objectionable—" of the proceedings, either upon or without the application of either party, and on such terms as may appear . . . just, order that . . . the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added." Cases might possibly be suggested in which parties ought to be joined—cases in which other persons are necessary. But I think that we cannot construe the words "ought to have been joined" to apply to cases in which they are sought to be joined merely for the convenience of the defendant. Then, is the other a person "necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter"? That much depends on the meaning of the words "questions involved

(1) 20 Q. B. D. 155. (2) 2 C. P. D. 80.

in the cause or matter." It has been contended by Mr. Raven that there are certain questions which this action will ultimately leave open in which all the documents and facts will have to be investigated. That may be so. But that does not—according to the principle of *Norris* v. *Beazley* (1)—enable a defendant for his own convenience to bring in another party. We are bound by that case, and on that ground—without expressing any opinion against the decision, but still having some doubt on the point—I think we ought to reverse the order of the official referee.

STEPHEN, J. I am of the same opinion, and for the same reasons, but I will read some passages from the judgments in *Norris* v. *Beazley* (1) which seem to put the matter very clearly. Grove, J., in that case thought that the rule was intended to enable the Court where the claim or the defence would be prejudicial by the absence of a party, to add such party at any stage on such terms as the Court may think fit. "But the power," said the learned judge, "is limited by the order to cases where the addition of a party is necessary to enable the Court to adjudicate upon and settle 'all questions involved in the action.' The term 'involved' is, no doubt, somewhat elastic. It might be so construed as to include a great number of subsidiary or collateral rights. It is difficult to define the meaning, but there must be some reasonable limit, and I am of opinion that the present case is not within such limit. The plaintiff here has a primâ facie right of action on a bill of exchange, and I do not think that the right sought to be set up on the part of the Niger Merchants Company can be fairly said to be involved in that action. It may be involved in the sense that upon the recovery in the present action there might be rights over as between the parties, but if a party is always to be added, because in certain contingencies a verdict one way or the other may give claims over, a very wide field indeed is opened." The effect of the rule so interpreted would be not to do complete justice between the parties on the matters in issue or any matters immediately adjacent to, and practically, but not technically, forming part of the matters in issue, but to enable all parties to be added against

(1) 2 C. P. D. 80.

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whom the plaintiff or defendant may be entitled to bring an action in consequence of or suggested by the matters in issue. I entirely agree with Grove, J., and it appears to me that Mr. Raven's argument would settle the question if instead of "involved" the words were "matters suggested by the action," or "for which the action, if it terminated in one way, would suggest a probable motive." The alteration which would be required to effect that, seems to me to shew that that is not the meaning of the rule, and, as Grove, J., said, "so great an extension of the objects of the rule would be very far from beneficial, and would lead to great confusion and embarrassment." I think so too. No doubt there are cases in which the plaintiff would have a right to have parties added. *Pilley* v. *Robinson* (1) was an obvious case of such a right, and the last few words of the judgment of the Lord Chief Justice in *Norris* v. *Beazley* (2) shew the same thing: "I wish to guard against being supposed by anything I have said to have meant that a defendant could never be added at the instance of the defendant. Such was not my meaning. I agree with what Archibald, J., so well said in *Edward* v. *Lowther* (3), viz. "that all parties against whom remedy or relief is sought should, if possible, be joined in the same action." That is, I think, as clear and neat an explanation of the word "involved" as can be found.

J. R.

The defendant, Stanley Brown, appealed.

1889. Feb. 6. *Moulton, Q.C.* (*Raven*, with him), for the appellant. The official referee had jurisdiction to add the executors as defendants, and in so doing he rightly exercised his discretion under Order XVI., r. 11. The plaintiffs are the only parties entitled to object to the new defendants being added. They might, if they chose, elect to proceed against Stanley Brown alone, but the third party cannot object, if the plaintiffs do not. If the plaintiffs do not proceed with their claim against the executors, the third party is not hurt. If the plaintiffs do proceed with their claim against them, then the object of Order XVI., r. 11, applies, namely, to settle in one proceeding all the disputes

(1) 20 Ch. D. 721. (2) 2 C. P. D. 80.
(3) 45 L. J. (C.P.) 417, at p. 419.

arising out of the transaction. *Norris* v. *Beazley* (1) has no application here, because in that case the plaintiff did object to the addition of the new defendant; here they do not, nor have the executors objected.

R. Henn Collins, Q.C., and *Upjohn*, for the respondent. The third party has a locus standi to object to the addition of the executors. He is made a party to the litigation, or the cause or matter—at any rate to the extent that he may object to any order which may injuriously affect him in this cause or matter—and his position is altered for the worse by reason of the order to add the new defendants, who have already taken out a summons claiming indemnity against him. It is not now contended that the official referee had no jurisdiction to make the order, but Order XVI., r. 11, limits the discretion by specifying conditions which must exist before it can be exercised. Here the new defendants were not parties "who ought to have been joined" within the meaning of the rule. The claim of the plaintiffs against the defendant, Stanley Brown, is separate from and independent of his claim for indemnity against the executors. Their presence before the Court is not "necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." Those words "involved in the cause or matter," impose a limitation upon the discretion. They refer to the cause or matter between the plaintiffs and the original defendant, and here the claim of the defendant against the executors is not "involved" in that cause or matter.

[LORD ESHER, M.R. Is not the evidence given in the cause or matter involved in it? And if that evidence raises a further question affecting other parties, is not the case brought within Order XVI., r. 11?]

No; if the action is brought in respect of one claim, and the evidence given in it discloses another and a different sort of claim, that claim is not involved in the cause or matter before the Court. The judgments of the Court in *Norris* v. *Beazley* (1) shew that some limitation is imposed by the rule, and in *Harry* v. *Davey* (2) a similar principle was applied.

(1) 2 C. P. D. 80. (2) 2 Ch. D. 721.

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Shiress Will, Q.C., for the plaintiffs, took the same course as in the court below.

LORD ESHER, M.R. One of the chief objects of the Judicature Acts was to secure that, wherever a Court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the Court shall have power to bring all the parties before it, and determine the rights of all in one proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same; it is sufficient if the main evidence, and the main inquiry, will be the same, and the Court then has power to bring in the new parties, and to adjudicate in one proceeding upon the rights of all the parties before it. Another great object was to diminish the cost of litigation. That being so, the Court ought to give the largest construction to those Acts in order to carry out as far as possible the two objects I have mentioned. Applying those general observations to this case: the transaction here is in respect of a lease and a claim for dilapidations under it. The lease has been in various hands; contracts have been made with regard to it; and it is obvious that there are various persons whose rights and liabilities will be, or may be, affected by the determination of the claim for dilapidations. The plaintiffs are the original lessors; one of the defendants is an assignee of the term. The proposed new defendants are executors of the will of the original lessee. It seems to me obvious that the rights and liabilities of all those parties may be affected by what has been done with respect to the lease and the dilapidations. There has been an agreement with regard to the lease made by the original lessee with Diplock, who has been brought in as a third party. His liability, it is clear, must or may depend upon what has occurred with respect to the lease, the dilapidations, and the agreement. The rights and liabilities of the plaintiffs, the original defendant, and the third party, are clearly involved in what has been done with respect to those three matters. The plaintiffs and the original defendant are of opinion that the rights and liabilities of two other persons,

namely, the executors of the original lessee, are also involved, and that they are rights and liabilities which at one time or other will have to be determined, having regard to the lease, the dilapidations, and the agreement. The executors also think that their rights will or may be affected. That being so, why should the Court go out of its way to decide that the rights and liabilities of the new defendants are not involved, unless it can see clearly that they are not involved? But, though all the others agree, the third party objects to the addition of the new defendants. He is entitled to object in the sense of having a locus standi to come here and support his objection, but I am of opinion that he cannot maintain that objection. In order to maintain it he must shew that the introduction of the new defendants will wrongfully injure him. If all he can shew is that he may rightfully be made liable to pay the new defendants, he does not shew enough. If he is liable, he ought to be made liable, and in this action. The judges in the court below thought themselves bound by *Norris* v. *Beazley*. (1) I think that that case is not in point. All it shews is that the new defendants could not be brought in without the consent of the plaintiffs. I assume, for the purpose of deciding the present case, that the decision in *Norris* v. *Beazley* (1) was correct, but it is not applicable here, because the plaintiffs do consent to the new defendants being added. I think that, in order to carry out the general objects of the Judicature Acts, all the parties in this case ought to be brought before the Court, so that their rights and liabilities may be determined in one action instead of in several. I am of opinion, therefore, that the objection taken by the third party fails, and that the decision of the Queen's Bench Division should be reversed.

BOWEN, L.J. I am of the same opinion. It is evident to any one who has followed the facts of this case that, if the decision of the Divisional Court were to stand, Diplock, the third party, would find rescue and relief upon a pure technicality. The point is a singular one. The plaintiffs, who are the original lessors, brought their action against a sole defendant, who was assignee of

(1) 2 C. P. D. 80.

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the lease. He was sued for dilapidations, i.e. for breach of covenant to yield up the premises in proper repair at the end of the term. He brought in Diplock under a third party notice, Diplock being the person who really ought to pay for the dilapidations, because he had caused them. When the case came before the official referee a doubt arose whether Diplock was bound to indemnify the original defendant, because in the agreement made between the original lessee and Diplock, in the clause which provided that he should perform the covenants in the lease and indemnify her against any breach of them, his liability to indemnify was limited to her and her executors, but did not extend to her assigns. It was said that if the plaintiffs had sued the executors as mesne assignees of the lease, and the executors had brought in Diplock, they would have been entitled to indemnity from him. Under those circumstances Stanley Brown, the sole defendant at that time, asks the plaintiffs if they object to the executors being brought in as defendants, because, if they were brought in, he could get relief. The plaintiffs do not object. He asks the same question of the executors, and they do not object. So that you have the plaintiffs, the original defendant, and the executors, all agreeing that the executors should be brought in as new defendants. Diplock does object, because he thinks that the executors may have a claim over against him for indemnity. It was said on his behalf that the case was not brought within Order XVI. r. 11. But if the plaintiffs, the original defendant, and the executors themselves, all agree that it is desirable for the determination of the matters which have arisen, or may arise, between the parties to the transactions in question, that the executors should be brought in, it seems to me that Diplock cannot say the case is not within rule 11, unless he can shew that he is hurt by their being brought in. Is he hurt? He says that he is one of the parties to the action, and has not consented, but he is only a party to the action in so far as the rules make him one. Unless he can shew that he is wrongfully hurt, he has no right to object. He is not hurt at all by the mere bringing in of the new defendants. He will not be hurt in any sense unless the plaintiffs make out their claim against those defendants. That claim must either be

rightful or wrongful. If wrongful, then the plaintiffs fail, and Diplock cannot be hurt; if rightful, he will become liable to indemnify the new defendants; but he is not hurt in any legal sense by being rightfully made liable. As Fry, L.J., put it during the arguments, if the plaintiffs do not prosecute their claim against the added defendants, the third party cannot be injured. If the plaintiffs do prosecute that claim, the third party is in the same position as if the plaintiffs had applied to have their statement of claim amended by adding the new defendants, an application to which the third party could have made no valid objection. I agree with what the Master of the Rolls said with respect to the objects of the Judicature Acts. I am of opinion that this appeal should be allowed.

FRY, L.J. I concur in the judgment delivered by Bowen, L.J., and I have nothing to add.

Appeal allowed.

Solicitors for appellant: *Mackrell, Muter, & Godley.*
Solicitor for respondent: *E. E. Loyd.*
Solicitors for plaintiffs: *H. C. Coote & Ball.*

W. A.

JAMES *v.* JAMES AND BENDALL.

April 2, 3.

*Arbitration—Application for Leave to revoke Submission—Arbitrator making a Mistake of Law in a Matter within his Jurisdiction—*3 *&* 4 *Will.* 4, *c.* 42, *s.* 39.

Where parties have agreed to refer questions in dispute between them to arbitration, the mere fact that the arbitrator in the course of the proceedings is making a mistake of law in a matter within his jurisdiction does not entitle the party dissatisfied with the arbitrator's view to come to the Court and claim as of right leave to revoke the submission.

Leave to revoke a submission on the ground of a mistake of law not amounting to an excess of jurisdiction will only be granted in very exceptional cases.

East and West India Docks Co. v. *Kirk & Randall* (12 App. Cas. 738) explained.

APPLICATION under 3 & 4 Will. 4, c. 42, s. 39, for leave to revoke a submission to arbitration.

An action was brought by the executrix of one William James, a solicitor deceased, for the wrongful detention of certain deeds, documents, and papers belonging to various clients of her

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testator, which had been entrusted to his custody by such clients, and which were in his office at the time of his death. The defendants were starting in business as solicitors, and had entered into an agreement with the plaintiff for the transfer to them of the business of the deceased, including the business premises and the goodwill. The defendant James did not appear. The defendant Bendall in his defence contended that the assignment of the goodwill of a solicitor's business must be taken to include the right of possession of such books, deeds, and papers as might be necessary for preserving the business of the different clients so far as the assignor had a right to possession. By an order made by consent of the parties the action and all matters in difference were referred to an arbitrator, who by the terms of the order was to be at liberty to decide the question of liability before deciding the question of damages.

In the course of the reference, and before deciding the question of damages, the arbitrator informed the parties that he had come to the conclusion that the assignment of the goodwill did not carry with it the right to the custody of the clients' papers.

The arbitration having been adjourned, the defendant Bendall moved for and obtained, upon the authority of *East and West India Docks Co.* v. *Kirk & Randall* (1), a rule to shew cause why the submission to arbitration should not be revoked, on the grounds that the arbitrator—

(*a.*) Had wrongly held that the word "goodwill" in the agreement between the parties did not include the right to the possession of the clients' papers as against the plaintiff.

(*b.*) Had rejected evidence on the question of the accepted meaning of "goodwill" in the profession on the transfer of a solicitor's business.

(*c.*) Had rejected evidence as to the intention of the parties when the agreement was entered upon.

(*d.*) Had wrongly construed the agreement and the effect thereof.

F. C. Gore, (*W. R. Davies*, with him), for the plaintiff, shewed cause against the rule. First, the application is too late, for the

(1) 12 App. Cas. 738.

arbitrator has already given his decision upon the question of liability. At common law the parties could never revoke a submission after a final decision had been given, and the Act of 3 & 4 Will. 4, c. 42, which prohibited revocation without the leave of the Court, did not give the Court power to grant leave to revoke, except during the period within which the parties might have before that Act revoked without leave.

Secondly, if the arbitrator's decision was not final, still the Court will not grant leave to revoke in this case, even assuming that the arbitrator was wrong in his law, unless the mistake was of so substantial a character as to amount to an excess of jurisdiction. In the case of *Scott* v. *Van Sandau* (1), which was decided shortly after the passing of the Act, it was laid down that the discretion of the Court "ought to be exercised in the most sparing and cautious manner, lest an agreement to refer, from which all might reasonably hope for a speedy end of strife, should only open the floodgates for multiplied expenses and interminable delays." The principle there laid down has ever since governed the practice of the Court. The case of *East and West India Docks Co.* v. *Kirk & Randall* (2) has introduced no new principle; it was a case in which the circumstances were exceptional. Here there is no substantial miscarriage of justice to call for the Court's intervention. [He also contended that the arbitrator was right in law; but the arguments on that point have been omitted.]

A. T. Lawrence, and *T. Terrell*, for the defendant Bendall. There has been no final decision by the arbitrator on the question of liability. All he did was to express a provisional opinion upon the point. That opinion was not even given in writing. And in *East and West India Docks Co.* v. *Kirk & Randall* (2), although the decision of the arbitrator which was complained of was in writing, the application to the Court was held to be in time. The arbitrator's decision on any matter submitted to him is not final until publication of his award.

The Court, having power to revoke the submission at any time before final award given, if it sees that the arbitrator is making a mistake of law, ought to exercise that power, unless the arbitrator is willing to submit to the direction of the Court on the

(1) 1 Q. B. 102. (2) 12 App. Cas. 738.

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matter of law in which he is going wrong: *Hart* v. *Duke.* (1) And the proper course for the Court to adopt, if satisfied that the arbitrator's view is mistaken, is to give him a direction upon the law, with an intimation that if he does not obey it, leave to revoke the submission will be granted. This was the course adopted by the House of Lords in *East and West India Docks Co.* v. *Kirk & Randall.* (2) It affords a convenient means of insuring that the arbitrator shall decide according to law.

DENMAN, J. I have come to the conclusion that this rule ought to be discharged. The rule was obtained on the several grounds set forth in the rule itself, (*a*) that the arbitrator had held that the word "goodwill" did not include the right to the possession of the clients' papers as against the plaintiff, (*b*) that he had rejected evidence as to the accepted meaning of goodwill on the transfer of a solicitor's business, (*c*) that he had rejected evidence as to the intention of the parties, and (*d*) that he had wrongly construed the agreement.

The first objection taken to the rule was that as the arbitrator had power under the order of reference to decide one of the questions before him, namely, the question of liability, before deciding the other, and had so decided it, his decision on that question was final, and that consequently the application for leave to revoke the submission was too late. But I do not decide the case upon that ground. I think that notwithstanding the arbitrator may have purported to decide the question the Court has still power to interfere if it thinks that there is proper ground for so doing; for I fail to see that the arbitrator has finally decided the question; I do not think that his power under the ordered reference is so limited as to compel him to decide one question finally before proceeding to the consideration of the second. In my opinion, even though he may have intended to decide the question of liability, it is open to him to reconsider his decision on that point at any time before finally giving his award in writing.

The second objection was that, where parties agree upon an arbitrator to decide the questions in an action for them, they

(1) 32 L. J. (Q.B.) 55. (2) 12 App. Cas. 738.

take him for better for worse, and that except in the event of some clear departure from his jurisdiction the Court will not interfere and give leave to revoke merely because one of the parties happened to be dissatisfied. I must confess that until recently I was undoubtedly under the impression that unless the arbitrator was exceeding his jurisdiction, or refusing jurisdiction and failing to do all that his jurisdiction required him to do, the Court would never interfere; but the case of *East and West India Docks Co.* v. *Kirk and Randall* (1) shews that my view on this matter was mistaken, for it establishes that if there is reasonable ground for supposing that the arbitrator is going wrong, even in a matter within his jurisdiction, the Court will under certain circumstances revoke the submission, or at all events practically order that the arbitrator shall take a different view. That case, however, does not decide that, wherever the arbitrator is making a mistake of law, either party has a right to come to the Court and demand leave to revoke ex debito justitiæ, or insist upon the arbitrator being set right under threat of such revocation, however small or unimportant the mistake may be.

The case of *East and West India Docks* v. *Kirk and Randall* (1) was an extremely peculiar case; it was one of vast proportions, and if the arbitrator had been allowed to go wrong many thousands of pounds would have been thrown away. But that is not the case here. In the present case the only question which the arbitrator had got to decide was whether the right to the custody of the deeds and papers belonging to the clients of the plaintiff's testator passed to the defendants under the agreement for the transfer of the goodwill, a matter which is of comparatively trifling importance. Moreover, it was the very question which was referred to the arbitrator; and the case of *East and West India Docks Co.* v. *Kirk and Randall* (1) is no authority for the proposition that, where the parties have agreed to refer a specific question to arbitration, one of the parties can come to the Court and claim leave to revoke the submission merely because the arbitrator is going to decide that question wrongly against him. As I am satisfied that no substantial injustice would be done by the arbitrator's mistake, even if it were a mistake, I think

(1) 12 App. Cas. 738.

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there is no ground for exercising our power of granting leave to revoke.

STEPHEN, J. I entirely concur with the judgment of my brother Denman. In the case of *East and West India Docks Co.* v. *Kirk and Randall* (1) I expressed an unqualified agreement with the opinion of my brother Grove, that before the Court exercises its discretion in giving leave to revoke a submission it should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal; and I have seen no reason to change my mind. And when that case came before the Court of Appeal Lord Coleridge, in dismissing the appeal, agreed with our observations upon the extreme inconvenience which would result if the practice of revoking submissions on the ground of a mere mistake in law were to become general. But then it is said that the House of Lords have laid down a new rule; but that is not so. The only proposition of law laid down by the House of Lords was that the Court had power to revoke the submission where the arbitrator was making a mistake of law even in a matter within his jurisdiction, a proposition which, if I may be permitted to say so, could hardly be disputed, having regard to the plain words of the statute of William IV. The point on which they differed from the Courts below was as to whether upon the facts of the case before them there was sufficient to justify the exercise of that power.

The old rule of practice was that parties submitting to a reference took the arbitrator with his law good or bad for better for worse. There is nothing in the decision of the House of Lords to lessen the general applicability of that rule, and, as I think the rule a satisfactory one, so far as I have the power to do so, I shall invariably or almost invariably enforce it.

In the case before the House of Lords, which was a very peculiar case indeed, a course was adopted for which I do not think there is any precedent since the case of *Hart* v. *Duke* (2), which was decided nearly thirty years ago. But that procedure is so awkward in form, so injurious if regarded as one to be generally adopted, and introduces so great a change into a highly

(1) 55 L. T. (N.S.) 245. (2) 32 L. J. (Q.B.) 55.

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useful and important branch of the law, that I feel there is the strongest possible objection to resorting to it in any case which does not imperatively call for it. There is perhaps a special objection to resorting to it in the case before us, as the question in dispute is a comparatively small one, and I unhesitatingly decline to interfere. (1)

Rule discharged.

Solicitors for plaintiff: *Peacock & Goddard, for Eaton, Evans & Williams, Haverfordwest.*

Solicitor for defendant Bendall: *Bridges, Sawtell, Heywood, Ram & Dibdin, for T. P. Bendall, Newmarket.*

J. F. C.

LUMB *v.* TEAL & CO. J. H. TEAL, CLAIMANT.

April 8.

County Court—Appeal—Proceedings in Interpleader—Right of Appeal where Damages claimed — County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 120, 157.

In an interpleader proceeding under s. 157 of the County Courts Act, 1888, the value of the goods claimed was less than 20*l.*, and the claimant claimed damages, exceeding 20*l.*, against the high bailiff and the execution creditor. At the hearing the judge gave judgment for 15*l.* for the claimant against the execution creditor, and did not grant leave to appeal:—

Held, that the execution creditor had no right of appeal under s. 120, which provides that there shall be no right to appeal in proceedings in interpleader, where the money claimed, or the value of the goods and chattels claimed, or of the proceeds thereof, does not exceed 20*l.*, unless the judge shall grant leave to appeal.

APPEAL from a decision of the judge of the Leeds County Court.

An action of *Lumb* v. *Teal & Co.* having been brought in the county court, judgment was entered for the plaintiff for a sum and costs, and execution was issued.

The high bailiff of the county court having seized in execution certain goods on the defendants' premises, a claim to part of

(1) Denman, J., was also of opinion that the arbitrator's decision was right in law, and that, in the absence of some specific stipulation to that effect, the transfer of the goodwill of a solicitor's business did not pass the right to the custody of the clients' papers. Stephen, J., however, declined to express any decided opinion upon the point.

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those goods was made by J. W. Teal. The high bailiff thereupon obtained the issue of an interpleader summons, under s. 157 of the County Courts Act, 1888, calling the execution creditor and the claimant before the Court in order to have the claim adjudicated upon. The value of the goods claimed was stated in the summons to be 18*l.* 15*s.*

The claimant then claimed, under s. 157, against the execution creditor and the high bailiff jointly, 35*l.*, damages for trespass to his goods, and gave particulars of that claim in accordance with the County Court Rules, 1888.

At the hearing of the summons, the county court judge gave judgment for the claimant for 15*l.* against the execution creditor only, part of that sum being in respect of the value of the claimant's goods taken in execution, and the remaining part being in respect of damages for the trespass.

The execution creditor appealed.

No judge's notes were before the Divisional Court on the hearing of the appeal, but two affidavits were filed on behalf of the execution creditor which purported to state what occurred at the hearing of the interpleader summons before the county court judge. No leave to appeal was given by the judge.

Cyril Dodd, for the respondent, took the preliminary objections; first, that the County Courts Act, 1888, gave the appellant no right of appeal, because the value of the goods claimed in the interpleader proceeding did not exceed 20*l.*, and no leave to appeal had been given, so that the prohibition in s. 120 (1)

(1) By s. 120: "If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge, may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the Rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court: Provided always, that there shall be no appeal . . . . in proceedings in interpleader where the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof, does not exceed twenty pounds, unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal.

"At the trial or hearing of any action or matter, in which there is a right of appeal, the judge, at the request of either party, shall make a

applied; and secondly, that there were no judge's notes, and therefore no materials before the Court on which to decide the appeal.

Ernest Pollock, for the appellant. There is a right of appeal here. This was not a mere proceeding in interpleader so as to make the prohibition in s. 120 apply. Damages were claimed to the amount of 35*l.*, and in respect of that claim an action could have been brought, though, under the concluding part of s. 157, such action would have been stayed upon the issue of the summons. The statute could not have intended to prohibit an appeal where the subject-matter was a claim for damages for trespass exceeding 20*l.* If that were the effect of s. 120, the high bailiff could escape an appeal, whatever damages were claimed against him, by taking out an interpleader summons, if the value of the goods claimed did not exceed 20*l.* The proceedings in interpleader were confined to determining the title to the goods; the claim for damages arises aliunde; it is no part of the interpleader proceeding; it is a matter which arises otherwise than by plaint, and is what s. 120 contemplates when it speaks of "any action or *matter*." Order XXVII., r. 9, of the County

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note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter."

Sect. 157: "If any claim shall be made to or in respect of any goods or chattels taken in execution, or in respect of the proceeds or value thereof, by any person, it shall be lawful for the registrar, upon application of the high bailiff, as well before as after any action brought against him, to issue a summons calling before the court as well the party issuing such process as the party making such claim, and the judge shall adjudicate upon such claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as he shall think fit, and shall also adjudicate between such parties, or either of them, and the high bailiff, with respect to any damage, or claim of or to damages arising or capable of arising out of the execution of such process by the high bailiff, and make such order in respect thereof, and of the costs of the proceedings, as to him shall seem fit; and such orders shall be enforced in like manner as any order in any action brought in such court, and shall be final and conclusive as between the parties, and as between them or either of them and the high bailiff, unless the decision of the court shall be in either case appealed from: and upon the issue of the summons any action which shall have been brought in any court in respect of such claim, or of any damage arising out of the execution of such process, shall be stayed."

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Court Rules, 1888, gives the party against whom damages are claimed in an interpleader proceeding a right to pay money into court, and provides that the parties shall have the same rights and remedies as if it were an action. With respect to the absence of the judge's notes, it is not a condition precedent to the right of appeal that the judge should be asked to take a note: *Seymour* v. *Coulson* (1); and by Order LIX., r. 8, of the Rules of the Supreme Court, the Court has power on appeals from inferior Courts, if the judge's notes are not produced, to hear and determine such appeals upon any other evidence or statement of what occurred before such judge as they may deem sufficient.

Cyril Dodd, for the respondent, was asked to argue the question whether the appellant had any right of appeal. Under s. 120 of the County Courts Act, 1888, the whole adjudication in respect of a proceeding in interpleader, and in respect of any claim for damages made therein under s. 157, is intended to be summary. The proviso in s. 120 expressly prohibits the right of appeal where the value of the goods claimed, or of the proceeds thereof, does not exceed 20*l.*, unless special leave to appeal be given; and the value stated in the summons is conclusive on all the parties to the proceeding: *White & Co.* v. *Milne, Milne, Claimant.* (2)

E. Pollock replied.

LORD COLERIDGE, C.J. I am of opinion that the two preliminary objections taken to this appeal must be sustained. The first was that the appellant had no right to appeal; and the second, that, if he had, there were no judge's notes, and no materials upon which we could be satisfied what were the facts proved before the county court judge.

As to the second objection, for all that is stated in the affidavits the county court judge may have been asked to take a note, and may have taken it, and such note may now be in existence. That being so, this Court cannot have recourse to the other modes which the rules provide in cases where the Court is satisfied that no note has been taken. There are therefore no materials before us upon which to decide this appeal.

(1) 5 Q. B. D. 359.

(2) 58 L. T. Rep. (N.S.) 225.

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Lord Coleridge, C.J.

As to the first objection I am equally clear that it should be sustained. It is objected that there can be no appeal because this is a proceeding in interpleader, the subject-matter of an interpleader summons where the money claimed, or the value of the goods and chattels claimed, or of the proceeds thereof, does not exceed 20*l.*, and the judge has given no leave to appeal. It is admitted that the value of the goods claimed in the interpleader issue was less than 20*l.*, and it is clear that there could be no appeal if it were an interpleader proper, because the words of s. 120 expressly negative the right of appeal. They are, "provided always that there shall be no appeal," &c. But it is said that this was not an interpleader proper, because s. 157 gives power to the county court judge, where the high bailiff interpleads, to adjudicate between the parties to the summons, or either of them, and the high bailiff, "with respect to any damage, or claim of or to damages arising, or capable of arising, out of the execution of such process by the high bailiff," and to "make such order in respect thereof, and of the costs of the proceedings, as to him shall seem fit." It was said that this, however, was no part of the interpleader proceeding, but was a power to award damages on a claim for a trespass to the goods, and that an action might have been brought in respect of such trespass, in which action, in the present case, an appeal could have been brought from the judge's decision. The answer is that no such action was brought. The claim for damages was clearly a thing arising out of the interpleader proceedings. It was admitted that but for s. 157 there would be no pretence for bringing the case here at all. Having regard to that section, which deals with the right of the high bailiff to issue a summons in interpleader, it seems to shew conclusively that the claim for damages is part of the interpleader proceedings. *White & Co.* v. *Milne* (1) decides that what is really the amount in dispute must be settled by the summons itself. In the present case the total value of the goods in dispute is stated in the summons as less than 20*l.* I am of opinion that the case is clearly brought within ss. 120 and 157, and therefore that there is no right of appeal.

(1) 58 L. T. Rep. (N.S.) 225.

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HAWKINS, J. I am also of opinion, for the reasons given by my Lord, that there is no right of appeal in this case. I also think that, if there were any such right of appeal, we ought not to hear the appeal because there are no judge's notes. We are not bound to admit anything but the judge's notes. It is true that by Order LIX., r. 8, we have power, if the judge's notes are not produced, to determine appeals upon any other evidence or statement of what occurred before him as we may deem sufficient, but we ought to have some reason or explanation given to account for the non-production of the notes—such as that none were taken, or that they have been lost. The affidavits here give no such reason or explanation. They do not state that no notes were taken, or that no application for them was made. On the ground, therefore, that there are no sufficient materials before the Court, I think that the appeal ought not to be heard.

Appeal dismissed.

Solicitor for appellant: *Augustus Kisch.*
Solicitor for respondent: *H. Ikin, for H. A. Child, Leeds.*

W. A.

March 9, 11.

COHEN *v.* KITTELL.

Gaming—Principal and Agent—Employment of Agent to bet on Account of Principal—8 & 9 Vict. c. 109, s. 18.

The plaintiff having employed the defendant to bet on commission, and the defendant having failed to make certain bets pursuant to the plaintiff's instructions, the plaintiff sued the defendant for breach of contract as his agent, claiming as damages the excess of gains over losses which should have been received by the defendant, had the bets in question been made, after deducting the amount of his commission :—

Held, that as by statute 8 & 9 Vict. c. 109, s. 18, the bets would not have been recoverable at law, the plaintiff could not maintain the action.

APPEAL from the Mayor's Court. The action was brought by the plaintiff to recover the sum of 27*l.* 13*s.* 6*d.* either as money had and received by the defendant to the plaintiff's use, or as damages for breach of contract by the defendant as the plaintiff's agent.

It appeared that the defendant was a turf commission agent

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who undertook to bet for customers for a commission of 2½ per cent. on winnings. The particulars of the claim consisted of an account shewing a number of bets of amounts not exceeding 5*l.* which the plaintiff alleged that the defendant had made or agreed to make on his behalf on these terms on horses which ran at Sandown Park and Newmarket races in October, 1888. The sum claimed was the excess of gains over losses shewn by this account after deducting the defendant's commission of 2½ per cent. on the former. The assistant judge left the case to the jury as regards the claim for damages, and they found a verdict for the plaintiff for the full amount claimed. The grounds of appeal were that the action was not maintainable, and that if otherwise the plaintiff was not entitled to more than nominal damages.

Candy, Q.C., (*Herbert Reed*, with him), for the defendant. The action is not maintainable. It is obvious that an agent can be under no legal liability to his principal for breach of a contract to make bets, which, if made, would have been void by statute 8 & 9 Vict. c. 109, s. 18.

Wildey Wright, (*McCullagh*, with him), for the plaintiff. The validity of the contract between a turf commission agent and his customer has been recognised by the Court of Appeal in *Read* v. *Anderson* (1) and *Bridger* v. *Savage*. (2) It is submitted that the effect of the former case is to establish by implication a legal obligation on the part of the defendant to make bets on the plaintiff's behalf pursuant to his instructions. According to the decision if the defendant had made the bets in question and had lost them, the plaintiff could not have revoked the authority given by him to the defendant to pay the winners, because of the possible consequences to the defendant as a member of Tattersall's. It is submitted that if the principal is under this obligation as regards the agent, the agent must be under some corresponding obligation as regards the principal. If the action be maintainable, the damages are either those claimed, or some lesser sum, because of the risk of non-payment by the third persons.

Candy, Q.C., in reply. The fact that the defendant could have had no legal remedy against the third persons is a complete answer

(1) 13 Q. B. D. 779. (2) 15 Q. B. D. 363.

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to the action. According to Story on Agency, 7th ed., § 222, in order that the principal may recover against the agent for negligence he must suffer "a real loss or actual damage, and not merely a probable or possible one." Here the only loss sustained by the principal was that of the chance of payments being made to his agent of the bets as debts of honour. In *Webster* v. *De Tastet* (1) it was held that no action would lie against an insurance agent for not procuring an insurance in respect of which the insured would not have had a legal remedy against the underwriters, though they made a practice of insuring the subject-matter and of paying the losses without dispute. This decision is conclusive in the defendant's favour.

HUDDLESTON, B. I am of opinion that this appeal should be allowed. The plaintiff claims damages from the defendant for the breach of a contract of agency into which he is alleged to have entered with the plaintiff as his principal. It must be taken as found by the verdict, that the plaintiff employed the defendant to make certain bets on his account, and that the defendant did not make the bets which he was thus employed to make. The case is apparently new. Certainly the recent cases arising out of similar transactions do not apply, as they are cases in which the agent did make the bets.

Suppose the agent had done so here what would have been his position? In that case, had he won and been paid, *Beeston* v. *Beeston* (2) and *Bridger* v. *Savage* (3), shew that he must have paid the money over to the plaintiff. Had he lost and paid, *Read* v. *Anderson* (4) in my opinion shews that the plaintiff must have recouped him. On the other hand, if he had won, but the third persons had not paid him, the effect of 8 & 9 Vict. c. 109, s. 18, must have been to leave him without any legal remedy. That section enacts "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to have been won upon any wager." The contract

(1) 7 T. R. 157.
(2) 1 Ex. D. 13.
(3) 15 Q. B. D. 363.
(4) 13 Q. B. D. 779.

of agency, therefore, for the breach of which the plaintiff sues the defendant, is one by which the plaintiff employed the defendant to enter into contracts which, if made, would have been null and void, and the performance of which could not have been enforced by any legal proceeding taken by the defendant for the benefit of the plaintiff. The breach of such a contract by the agent can give no right of action to the principal. I see no difference between the case and the employment of an agent to do an illegal act. The section of Story on Agency which has been cited, shews that the right of the plaintiff to have recovered in respect of the contract to have been made by the agent on his behalf is an "essential ingredient" in the case against the agent for negligence in not contracting. In this case this "essential ingredient" is wanting, and *Webster* v. *De Tastet* (1) shews that, this being so, the consideration urged on behalf of the plaintiff, that the losers of the bets to the defendant would probably have paid them as debts of honour, is wholly immaterial.

MANISTY, J. A decision in favour of the plaintiff in this case would still further defeat the object of this statute, which, as the preamble shews, was to add to the strictness of the law with respect to gambling. Since the Act passed, however, and in consequence, as I cannot but think, of some of the decisions upon it, the practice which it was intended to discountenance has greatly increased, and that with results of a most disastrous character, as regards both horseracing and transactions in stocks. The contracts avoided by the 18th section are not, it is to be observed, "contracts of gaming and wagering," but "contracts *by way of* gaming and wagering." These words, which are perhaps capable of a different interpretation, have been held not to apply to contracts between principals and agents by which the agents agree to bet with third persons on behalf of the principals. Doubtless where the gambling transaction is a thing of the past, the bet having been won or lost, and the money having been received or paid, as the case may be, by the agent, it would be unjust that he should not in the one case account to, and in the other case be recouped by his principal. But in *Read* v. *Anderson* (2) it

(1) 7 T. R. 157.

(2) 13 Q. B. D. 779.

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was held by a majority of the Court of Appeal that as soon as a bet has been made by an agent in his own name on account of a principal, the principal cannot revoke the authority to pay the bet should it be lost, because forsooth the result to the agent may be the inconvenience of exclusion from Tattersall's. The decision is, of course, binding on this Court, but I personally agree with the dissenting judgment of the Master of the Rolls. I cannot see why the position of the agent in such a case should differ from that of a stakeholder.

We are now invited to go a step further and to hold that a principal, who employs an agent to make bets on his account, can maintain an action for negligence against the agent should the latter refuse to bet for him. The custom of Tattersall's is again invoked, this time to make the agent responsible. It is clear, however, that the action cannot be maintained. It is unnecessary to refer at length to the legal question, which is discussed in Story on Agency, 7th ed., §§ 222, 330. It is sufficient to say that the effect of statute 8 & 9 Vict. c. 109, s. 18, being to render bets irrecoverable at law, a principal can suffer no real loss through the refusal of his agent to make bets on his account.

Appeal allowed.

Solicitor for plaintiff: *F. A Manley.*
Solicitors for defendant: *Dabbs & Reeds.*

H. D. W.

[IN THE COURT OF APPEAL.]

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April 15, 16.

IN RE BATTEN. EX PARTE MILNE.

Deed of Arrangement with Creditors—Deeds of Arrangement Act, 1887 (50 & 51 *Vict. c.* 57), *ss.* 5, 6, 7, 12—*Registration—Execution of Deed by Creditors after Registration—Alteration of Deed—Bankruptcy—"Person aggrieved"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 104.

A deed of arrangement, whereby a debtor assigned all his property to a trustee for his creditors' benefit, made parties thereto of the 4th part, "the several persons, companies, and firms whose names and seals are hereunto signed and affixed respectively, being creditors of the debtor, and all other creditors of the debtor acceding hereto." The trust declared by the deed was to divide the balance of the proceeds of the estate after payment of expenses, &c., "rateably among the creditors parties hereto, including as such creditors, if the trustee and committee of inspection shall determine, but not otherwise, such persons being creditors of the debtor as may have refused or neglected to execute these presents." The deed was executed on the same day by the debtor, the trustee, and one creditor who signed and sealed in a schedule thereto; and within seven days was registered under the Deeds of Arrangement Act, 1887, which avoids such deeds unless registered in compliance with the Act. Subsequently to such registration six other creditors signed and affixed their seals in the schedule:—

Held (reversing the decision of the Queen's Bench Division), that the execution of the deed by creditors after registration did not amount to an alteration of the deed so as to avoid it or vitiate the registration of it; and that the provisions of the Act were sufficiently complied with by the registration of the deed as it existed at the time of such registration.

APPEAL from the order of the Queen's Bench Division (Cave and Charles, JJ.) dismissing an appeal against a receiving order in bankruptcy made by the registrar of the Bristol County Court.

The facts were as follows:—

The bankrupt had on June 25, 1888, executed a deed of arrangement with his creditors, under which the appellant Milne was trustee. Such deed purported to be made between the bankrupt C. W. Batten of the 1st part, the appellant Milne of the 2nd part, certain persons forming a committee of inspection of the 3rd part, "the several persons, companies, and firms whose names and seals are hereunto signed and affixed respectively, being creditors of the said C. W. Batten, and all other creditors of the said C. W. Batten acceding hereto, herein called the creditors," of the 4th part, and the bankrupt's mother, who joined in order to postpone a claim in favour of the general

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body of the creditors, of the 5th part. The deed, after reciting that the debtor was indebted or liable to the said creditors in or for the several sums set opposite to their respective names in the schedule thereto, and was unable to meet such liabilities in full, purported to assign all the property of the debtor to the appellant on trust for conversion, and, after payment of expenses and claims which would by law be entitled to be paid in full in priority to other debts as in cases of bankruptcy, to divide the balance of the proceeds "rateably among the creditors parties hereto, including as such creditors, if the trustee and inspectors shall determine, but not otherwise, such persons being creditors of the said debtor as may have refused or neglected to execute these presents." The deed contained a release of the debtor by the creditors, provided that the deed was duly registered, and was not set aside in bankruptcy, from the debts specified in the schedule and all other debts, if any, owing from the said debtor to the said creditors respectively in respect whereof they would be entitled to receive dividends under the deed.

The deed was executed on June 25 by the debtor, the trustee, the debtor's mother, and one person who was a creditor, and also one of the committee of inspection named in the deed, and who executed by signing his name and affixing his seal in a schedule to the deed which stated the amount of his debt.

On July 2 the deed was registered under the Deeds of Arrangement Act, 1887, a copy of the deed with the schedule as it then existed being filed as required by that Act. The trustee after registration of the deed proceeded to send round circulars giving notice of it to the creditors: and subsequently to such registration six other creditors of the bankrupt signed and affixed their seals in the schedule, the amounts of their respective debts being thereupon entered opposite to their respective names in the schedule. The trustee proceeded in due course to administer the estate under the trusts of the deed.

On September 24 following, however, a petition in bankruptcy was presented against Batten to the Bristol County Court, alleging as an act of bankruptcy, inter alia, the execution of the deed; and on October 13 the receiving order was made. The trustee of the deed appealed to the Queen's Bench Division

against such order on the ground that the petitioning creditors' debts did not amount to 50*l.*, which was the case. The Queen's Bench Division dismissed the appeal on the preliminary objection that the deed was void, the registration having been vitiated by the alteration of the deed by its execution by creditors subsequently to registration; and, consequently, the appellant was not a party aggrieved by the receiving order. (1)

Rigby, Q.C., and *Wace* (with them, *F. C. Willis*), for the appellant. If the deed of arrangement was duly registered, the appellant is entitled to appeal against the receiving order as a person aggrieved within s. 104 of the Bankruptcy Act, 1883; because, if the bankruptcy stands, the deed is avoided as an act of bankruptcy; but the bankruptcy ought not to stand, on the ground that there was no sufficient petitioning creditor's debt. The deed was duly registered under the Deeds of Arrangement Act, 1887, and nothing has since taken place to avoid it, either at common law, or by virtue of the provisions of the Act. It is clear that, if nothing had been done subsequently to the registration, at the moment of such registration there was a perfectly valid deed, by which the property in the debtor's estate passed to the appellant. Assuming that what took place afterwards amounted to a material alteration of the deed, it is familiar law that the alteration of a deed by which an estate is conveyed cannot revest the estate in the grantor: *Bolton* v. *Bishop of Carlisle.* (2) If, as is contended, there was on July 2 a perfectly valid registration of a valid deed, which complied with all the re-

(1) The 5th section of the Deeds of Arrangement Act, 1887, provides that in the case of such deeds executed in England or Ireland they shall be void "unless the same shall have been registered under this Act within seven clear days after the first execution thereof by the debtor or any creditor."

By the 6th section, sub-s. 1: "The registration of a deed of arrangement shall be effected in the following manner: (1) A true copy of the deed, and of every schedule or inventory thereto annexed or therein referred to, shall be presented to and filed with the registrar . . . . together with an affidavit verifying the time of execution, and containing a description of the residence and occupation of the debtor, and of the place or places where his business is carried on, and an affidavit by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of his creditors."

(2) 2 H. Bl. 260.

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quirements of the Act, what subsequently took place cannot avoid the passing of the estate by such deed. There is no provision in the Act under which by matters subsequent a deed once duly registered can be unregistered.

Secondly, there was no material alteration of the deed by reason of the subsequent execution by creditors, either at common law or for the purposes of the Act. Execution by creditors was not necessary to make it an effective deed. Such execution did not in the least alter the operation of the deed. There is no provision in the Act requiring that all parties who execute should execute before registration. The provisions of s. 6, sub-s. 1, are sufficiently complied with, if a copy of the deed and of every schedule or inventory annexed thereto or referred to therein, as it exists at the time of registration, is registered, which was done here. Similarly the provisions of s. 12, sub-s. 2, as to the names and addresses of parties to the deed, only apply so far as there are parties ascertained at the time of registration, whose names and addresses are given. It is clear that a deed of this sort might be made with creditors generally as a class, without naming them individually. It is not necessary that the creditors should be made parties to the deed at all. The Act is intended to apply to all deeds of arrangement, and there is no provision that such deeds must be in a particular form. It was suggested in the Court below that the effect of the deed was altered, because the position of the creditors who executed after registration under it was altered by such execution; that they would thereupon become entitled to the benefit of the deed, and, as the amount of their debts was stated in the schedule, the trustee would be estopped from disputing them: but a long series of cases have established that deeds of this sort, for the benefit of creditors, are to receive a somewhat different construction from that which would perhaps be in strictness their natural construction; and the Courts have frequently held that deeds, which might upon their primâ facie construction be thought applicable to scheduled creditors, or creditors who have executed only, were to be construed as applicable to all creditors. See *Raworth* v. *Parker* (1); *Jolly* v. *Wallis* (2); *Spottiswoode* v. *Stock-*

(1) 2 K. & J. 169.

(2) 3 Esp. 228.

dale. (1) The clause in the deed giving a discretion to admit to its benefits creditors who may have refused or neglected to execute is really only expressive of the law as laid down by Courts of Equity with regard to such deeds. The answer to the argument with regard to the alleged estoppel is that that does not alter the effect of the deed, but merely the position of the parties with regard to it. The effect of the deed was not really altered by the subsequent execution by creditors, because it was in contemplation by the original scheme of the deed that the creditors to be included as parties should form an open class, and that creditors should come in and execute subsequently. In deeds of this sort it is practically impossible to procure execution by all the creditors in the first instance, and registration must take place within seven days after the first execution by the debtor or any creditor who executes.

[They also cited *Boldero* v. *London and Westminster Loan and Discount Co.* (2); *Whitmore* v. *Turquand* (3); *West* v. *Steward* (4); *Re Whelan, Ex parte Sadler.* (5)]

Sir R. E. Webster, A.G., and *Muir McKenzie* (with them, *Herbert Reed*), for the official receiver, acting as trustee in bankruptcy. The intention of the Deeds of Arrangement Act, 1887, was that the whole transaction, with the particulars therein mentioned, should appear upon the register. The deed as produced and relied upon by the appellant never was duly registered, and therefore is void by reason of the statute. There has been a material alteration of the deed since registration, the effect of which is that the statute has not been complied with. The very mischief the Act aimed at preventing was that deeds of this kind were executed and taken round privately to creditors for their assent, and the unfortunate individual creditor, having no means of knowing who the other creditors were, which of them were assenting, or the position of the estate, was induced or driven to come in, as being the only course open to him. To prevent this, and to protect creditors, the Act provides for the registration of such deeds, with certain particulars. The 6th section, sub-s. (1),

(1) G. Coop. 102.
(2) 5 Ex. D. 47.
(3) 1 J. & H. 444; 3 De G. F. & J. 107.
(4) 14 M. & W. 47.
(5) 48 L. J. (Bkcy.) 43.

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provides that a true copy of the deed, and of every schedule or inventory thereto annexed or therein referred to, is to be filed; and s. 12 provides that any person may search the register and make extracts of the names and addresses of the parties to the deed. It is contended that the object was that a creditor might have an opportunity of knowing the names and addresses of the other creditors parties to the deed. The object is entirely defeated if creditors may become parties to the deed after registration. The copy of the schedule filed at registration is no longer a true copy, for other creditors now appear in the schedule. If the rights of the creditors under the deed are to be affected by execution or non-execution, those who execute must execute before registration; for otherwise, the deed being materially altered by the execution by creditors after registration, the deed as a whole is not registered, and the registration is thereby avoided. The effect of the deed as to the creditors who executed after registration was altered materially, because the deed gives the trustee and inspectors a discretion to refuse to admit to the benefit of the deed those who have neglected or refused to execute it; and upon execution by the creditors who subsequently executed, they became absolutely entitled to the benefit of the deed, and the amount of their debts was determined by their insertion in the schedule. The effect of the deed was thereby altered as to them and as to the other creditors. Having regard to its object, the Deeds of Arrangement Act, 1887, ought to receive a strict construction, and, if the scheme of a deed is such that it cannot be registered with the particulars required by the Act, the Act must be taken by implication to forbid such a deed.

[They cited *Weeks* v. *Maillardet* (1); *Sellin* v. *Price* (2); *Ex parte Cockburn.* (3)]

Rigby, Q.C., in reply.

LORD ESHER, M.R. In this case, a receiving order having been made against a debtor under the Bankruptcy Act, the trustee of a deed of arrangement made by such debtor for the benefit of

(1) 14 East, 568. (2) Law Rep. 2 Ex. 189.
(3) 33 L. J. (Bkcy.) 17.

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creditors seeks to intervene as being a person aggrieved within the 104th section of the Act, and to dispute the validity of the order. He alleges that he is so aggrieved, because, if the order stands, the bankruptcy being within three months from the date of the execution of the deed, the deed as an act of bankruptcy would be void and his title under it would be defeated: and he says that the order ought not to stand, because the petitioning creditor's debt does not amount to 50*l*. The answer made is that, admitting that to be so, and that the objection would be a good one if the appellant were entitled to intervene, as being the trustee of a valid deed of arrangement, the deed has not been properly registered and is therefore void, and the appellant is consequently not entitled to intervene. If the deed were properly registered but the petitioning creditor's debt were of sufficient amount, the deed though registered would be an act of bankruptcy, and the title of the trustee would be defeated; but, if the petitioning creditor's debt were insufficient, then the bankruptcy must fall to the ground, and consequently the deed would stand. That being so, the question upon which the whole case depends is whether the deed was properly registered. If it were not, it would be void, and the result would be that the appellant would not be entitled to intervene; if it were, then the opposite conclusion would follow. The question depends, as it appears to me, upon the construction of the deed and the effect upon it of the provisions of the Act which requires it to be registered. I think we must in the first place construe the deed as if there were no such statute in existence; and upon such construction we have then to see whether it has been properly registered. It is said that the deed upon which the appellant relies has never been registered: that, though a deed was registered, it was not this deed, because the deed that was registered has been altered since registration: and it is said that at all events the deed that was registered has become void, because it was materially altered. Whether these contentions are well founded must depend greatly on the true construction of the deed. If all that was done after registration was within the terms of the deed and done in order to carry out those terms, I cannot see how the deed can be considered to have been thereby altered.

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A deed can only be said to be altered, if its effect is altered: to carry out its terms is not to alter it. What has been done in this case after registration? Certain creditors of the debtor subsequently executed the deed. The question is whether such execution by them alters its effect. The deed is expressed to be made between parties. Certain persons are named as parties, and then we come to a description of the creditors who are to be parties. The first creditors so described are "the several persons, companies, and firms whose names and seals are hereunto signed and affixed respectively." Those no doubt would be in a schedule to the deed, because that is the way in which creditors in such cases do sign their names and affix their seals. Then we find that "all other creditors of the said C. W. Batten acceding hereto" are made parties to the deed. The effect of those words is to make creditors who assent to the deed, although they do not sign or seal, parties thereto just as much as if they had executed it. Then we have a further provision of a somewhat peculiar character, the effect of which, however, is plain enough I think. The deed provides that the trustee after making certain payments is to divide the balance of the estate rateably among the creditors parties thereto. If the words stopped there, they would include apparently those who had executed and those who had assented to the deed without executing; but then there are further words forming a parenthesis, by which, as is sometimes the case in deeds of this sort, creditors are brought in other than those previously mentioned, viz. the words "including as such creditors, if the trustee and inspectors shall determine, but not otherwise, such persons being creditors of the said debtor as may have refused or neglected to execute these presents." Though a creditor may have refused or neglected to execute, he may be allowed, if the trustee and inspectors so determine, to come in, and will then be in the position of a party to the deed. Therefore we have as parties these various classes of creditors; creditors who execute the deed, those who assent thereto, and those who, though they may have refused or neglected to execute, are subsequently, notwithstanding such previous refusal or neglect, willing to come in and are allowed to do so by the trustee and inspectors. The residue is to be divided among all creditors so becoming parties

to the deed, and, when any creditor does what is necessary to bring himself within any of the classes of creditors which I have mentioned, at however late a time before the distribution, by the terms of the deed itself he becomes a party to the deed; and in so doing he is, in my opinion, carrying out the provisions of the deed not altering it. The suggestion is that at a certain moment of time, viz. that of registration, this deed was complete and that some time after it was altered. If my view is correct, the deed was not complete as suggested and never has been altered. It was not complete till it was fully carried out by what was afterwards done, and what was afterwards done did not constitute an alteration of the effect of its terms.

Then comes the question whether it was rightly registered, which is quite a different question. If it was rightly registered, though not complete in one sense, it has in my opinion never been altered but has always remained the same deed. It is not a case of a deed avoided by something which has altered it, but it has always remained the same deed, and all that was done was merely by way of carrying out that deed. To determine the question whether it has been properly registered we must consider the terms of the Act of Parliament, and see whether on their true construction anything has been done to vitiate the registration that was once effected, or anything omitted which renders the registration ineffective. The effect of the statute is that, if the deed is not properly registered under it, it is void altogether, though, as I have said, the registration does not prevent its being an act of bankruptcy, if it can be taken advantage of as such. The first section which we need consider is the 5th. That section provides that the deed shall be void unless it shall have been registered within seven clear days after the first execution thereof by the debtor or any creditor. It is not "after the first execution thereof by creditors" in the plural, but after the first execution thereof by any creditor. If the debtor executes it first, it must be registered within seven days after such execution. If a creditor executes it first, it must be registered within seven days after such execution, though other creditors may have executed later. The 6th section provides that registration "shall be effected in the following manner: a true copy of the deed and

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of every schedule or inventory thereto annexed or therein referred to shall be presented to and filed with the registrar, &c." It is not every schedule that may exist or be used in relation to the deed that is included; it is only every schedule or inventory that is thereto annexed or therein referred to that is to be registered. The deed, as we have seen, is to be registered within seven days after it has been first executed by the debtor or any creditor: and it would seem that the copy of any schedule annexed or referred to is to be given in at the time of registration of the deed; but, if so, how can any copy be given at the time of registration other than a copy of such schedule as it exists at the moment of registration? It appears to me that, if a copy of any such schedule as it then exists is given, the Act is complied with. Then it is provided that there shall be an affidavit verifying the time of execution and containing a description of the residence and occupation of the debtor and of the place or places where his business is carried on. It does not appear that that affidavit must necessarily be made by the debtor; apparently anybody may make it. But it does not seem to me that that affidavit is to contain statements as to anything which does not exist at the moment of registration. Then the Act provides for another affidavit to be made by the debtor stating, not the number of creditors who have assented or executed, but "the total estimated amount of property and liabilities included under the deed and the total amount of the composition, if any, payable thereunder; and further it is to state the names and addresses, not of the creditors parties to the deed, or who have executed or assented thereto, but "of his creditors," i.e., of all his creditors. Is there anything in that which shews that every creditor who executes must have executed at the time when registration takes place? Certainly not. Furthermore, there is nothing, so far as I can see, in the 12th section, when it comes to be considered, which affects the question what has to be done at the time of registration. On the true construction of the statute it appears to me to be wrong to say, as was said by the counsel for the official receiver, that the schedule which is to contain the names of those who sign and seal the deed must be completed before there can be a valid registration. So far from there being anything in the Act which

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shews that to be so, it seems to me that it would really defeat the intention of the Act if that were necessary; for, if the deed cannot be registered till the schedule is completely filled up, it would practically be impossible to register such a deed as this, because it would inevitably happen that the schedule could not be filled up within the limit of time given for the registration. I do not agree with the suggestion made by the counsel for the official receiver to the effect that the Act should be construed strictly: on the contrary, I should think that the object of the legislature was to provide that all such deeds of arrangement might be registered, and that we ought to construe the Act largely so as to include all deeds of arrangement, not only those in which the schedule is completed within the seven days allowed for registration, but those in which it is not so completed. For these reasons it seems to me that this deed was properly registered according to the Act, and all the conditions and forms rendered necessary by the Act for the purpose of registration were fulfilled: and that the deed has not been altered so as to render it void since registration, because all that has been done since registration has been done not for the purpose or with the effect of altering, but only for the purpose and with the effect of carrying out its provisions. The result is that the appellant is the trustee under a valid and duly registered deed. As I have said, the registration would not prevent the deed from being an act of bankruptcy, and therefore being subject to be defeated by a valid bankruptcy; but the deed being good, except if defeated by such a bankruptcy, it entitles the trustee to intervene for the purpose of shewing that the bankruptcy ought not to stand, and that the receiving order ought to be set aside, because it was not founded on a sufficient petitioning creditor's debt. The appellant has in my opinion a locus standi to object to the order, and that being so his objection is admittedly fatal. For these reasons I think the appeal must be allowed.

FRY, L.J. The question in this case comes before us in rather a curious way. It is admitted that, if the appellant can open his mouth to the Court, he will be able to defeat the petitioning creditors, because the petitioning creditors have no sufficient

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debt to support the petition. Therefore the simple inquiry is whether the appellant can be heard at all upon this matter.

The appellant claims under a deed executed on June 25, 1888, by which he was made trustee and assignee of the whole of the debtor's property. On that day the deed was executed by the debtor, by the trustee, by the mother of the debtor, who was postponing a claim which she had on the estate in favour of creditors generally, and by another person who filled the double character of inspector under the deed and of a creditor. Now at common law the execution of that instrument undoubtedly passed the property comprised in it to the appellant, and what was previously vested in the debtor thereby became vested in him: but under the Bankruptcy Act that instrument would be a void instrument in the event of a bankruptcy within three months, and the estate which passed thereby would thereupon be divested from the trustee. Therefore primâ facie the appellant is a person who would be aggrieved, if his assignor were wrongly made a bankrupt, and consequently a person who is at liberty to open his mouth to shew that his assignor was improperly made a bankrupt. That primâ facie title of his it is sought to meet in this way; it is replied that the deed of June 25 is a void instrument, and therefore that the appellant is not aggrieved by the bankruptcy. The question which we have to determine is, whether that contention can be supported or not.

After June 25, namely on July 2, and therefore within the seven clear days from the execution of the deed by the debtor, the deed was registered in pursuance of the Act of 1887, to which our attention has been directed. Subsequently to that date certain creditors, besides the creditor who had already executed, appended their names and seals in the schedule as creditors of the debtor. It is said in the first place that the deed was altered in a material particular by the signatures of those creditors, and therefore that it is void. But there are two answers, both of which are sufficient in my opinion to meet that allegation. In the first place, it is common knowledge that the subsequent cancelling of an instrument which has conveyed an estate does not divest the estate. It may affect or destroy the evidence of the conveyance: but it does not divest the estate. Therefore it

is clear, regarding the matter as at common law, that the execution by creditors subsequently to June 25 and July 2 cannot have avoided the assignment of the property, which had been effected on June 25, and which was in force on July 2. Therefore the estate which had been vested in the appellant remained vested in him, even if the deed were subsequently cancelled, and he has a primâ facie right to appear in this matter to shew that the receiving order ought not to stand. That is one answer which appears to me to be good in law. Then there is another answer: it is said for the appellant, and I think rightly, that the execution by the creditors subsequently is not a material alteration of the deed in the sense in which those words are used, when it is said that the material alteration of a deed cancels it. The reason is that such subsequent execution was really a fulfilling of the deed, and not an alteration of it; because the deed itself carries on its face an intention that it shall be the subject of subsequent execution by creditors. The parties of the fourth part are "the several persons, companies, and firms, whose names and seals are hereunto signed and affixed respectively, being creditors of the said C. W. Batten, and all other creditors of the said C. W. Batten, acceding hereto." Now accession to a deed may be in various ways. One well-known mode of acceding to a deed of this description is by executing the deed in the schedule; but, further than that, the accession by execution is a matter so entirely in the contemplation of the deed that the neglect or refusal to execute may give a right to the trustee to exclude a creditor from the benefit of it. So far, then, from the subsequent execution being a thing inconsistent with the deed, it is a thing which the provisions of the deed are calculated to enable the trustee to compel. I cannot hold that that, which the deed contemplates, and which the trustee under the deed may compel to be done, can cancel the deed itself.

But it is said that, however this may be at common law, the whole matter is affected by the statute of 1887, and that the deed is made void by that statute.

Before I refer to the provisions of the Act of Parliament, I wish to pause for one moment to consider what was the law and the practice at the time when that statute was passed. It is old

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and very familiar law that the Courts have leaned, and leaned very strongly, in favour of allowing creditors to come in under such deeds as this. They have done so, because the exclusion of creditors from the benefit of such deeds is an injury to those creditors, and also because the scheme of such a deed is equality between all creditors. Therefore, by a series of decisions, both at Common Law and in the Courts of Equity, the inclination of the Courts has been made manifest to allow, and I would almost say compel, the trustee to permit all creditors to come in, so as to make the administration of these instruments as equitable as possible, and to allow any creditor to claim pari passu with the others. It has, accordingly, been held over and over again that the filling up of blanks in such instruments by the creditors coming in is not an alteration of the instrument that would avoid it.

We therefore approach the statute with the knowledge that the practice was to allow creditors to come in; and that the law favoured and almost compelled it: and we have to inquire whether the old practice and well-known and familiar law, which existed at the time when the Act was passed, were intended to be entirely altered. The suggestion was that the statute requires that the whole transaction shall appear on the face of the deed when registered; that all the creditors shall be in the schedule at the time of registration, and that the whole matter shall be finally fixed and settled at the time when the copy of the deed and schedule is to be presented and filed, so that persons who have inspection thereof may know exactly the whole position of the debtor's estate. It would follow, of course, if that were so, that after registration no creditor can ever come in, however just his claim may be, or however accidental may have been his omission to come in; and consequently that equality between the creditors, which it had been the anxious desire of the Courts previously to promote, would be excluded by the operation of the Act. I can find nothing in the Act which leads to this conclusion, and I find a great deal which, to my mind, is absolutely inconsistent with it. In the first place I find that the Act is addressed to all cases in which the instrument is in respect of the affairs of the debtor, and is for the benefit of his creditors generally: and I

find that the words "creditors generally" are to include "all creditors who may assent to or take the benefit of a deed of arrangement." Therefore there is apparently an anxious desire that everybody who assents, everybody who desires to take the benefit of the deed, shall be included in the operation of these deeds: and it seems to me that there is the strongest indication that the old view of the law with regard to these deeds, viz., that they should include all the creditors, was in the mind of the legislature. It is to be observed that the words appear to recognise that to assenting and taking the benefit of a deed it is not necessary that there should be execution or entry in a schedule. Again, the 5th section, which fixes the time within which registration of the deed must take place, provides that it must be within seven clear days after the first execution thereof by the debtor or by any creditor. If the view contended for by the official receiver were correct, every creditor who could come in must come in within these seven days; and yet the Act is entirely silent with regard to anything of the sort. The time of registration is fixed with regard to the first execution of the instrument; and the Act is entirely silent as to the last execution of it. It leaves that matter entirely open. Again, if it were intended that the information to be given by registration should include information as to all the creditors, one would expect to find some provision that the deed should enumerate the creditors who were to be paid: but the form of the deed is left absolutely open by the statute; and it need not mention the creditors at all, by schedule or otherwise. An instrument, which conveyed the property to a trustee requiring him to pay the creditors generally, and leaving him to find out who they were, would be within the scope of the Act, and a copy of such an instrument would not furnish any information as to the creditors, who they were, their addresses, or the amounts which they claimed. Again, the section gives an enumeration of the various particulars which are to appear on the face of the register. There is no provision that the creditors are to appear on the register. Nothing about them is required to appear on the register, neither their names, nor their addresses, nor the amounts which they claim. What does this statute provide with regard to the creditors? It

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provides that there shall be an affidavit of the debtor stating their names and addresses, but there appears to be no provision that this affidavit is to be disclosed to the public, and therefore a person who goes and searches in the office has no means of learning from that the names of the creditors, which is to my mind a very strong indication that there was no intention that the system of registration should make the names of the creditors and the amounts of their respective debts known to the public. Again, the statute requires that the debtor's affidavit should contain a statement of the *estimated* amount of his liabilities. Now, if it were required that every creditor should execute before the seven days expired, stating of course the amount for which he executed according to the ordinary practice, the result of which would be that the debtor would be estopped from denying that amount and the creditor from claiming any more than that amount, the amount of the liabilities for which the deed was to stand would thereby necessarily be known, and there would be no need of any such statement on affidavit of the estimated amount of liabilities. The fact that there is to be such a statement is, to my mind, very strong to shew that they need not be definitely ascertained and stated at the date of registration. I come therefore plainly to the conclusion that the statute was not intended to alter the law and practice with respect to such instruments as previously existing: and that it was no part of the scheme of the Act that the creditors should be ascertained at the date of registration: that the instrument being a conveyance of the legal estate was not avoided either at the common law or by statute by reason of what took place after its registration; and consequently that the legal estate is in the appellant, who has a right to be heard in respect of such estate, and to shew that he ought not to be deprived of it by the subsequent bankruptcy. For these reasons I am unable to agree with the decision of the Court below, and I think the appeal should be allowed and the bankruptcy order discharged.

LOPES, L.J. I have very few words to add, the matter having been so exhaustively dealt with. The question in this case is, whether this deed is registered in compliance with the Act of

1887. The material objection which is taken is this: viz. that the deed produced is not the same as the deed registered, because there is an addition to it, such addition being the execution by certain creditors after registration. It is said that this is a material alteration which avoids the deed. Now nothing which has been done subsequently to registration to my mind alters the effect of the deed. What has been done subsequently is simply that which is contemplated by the deed and, so far in my opinion from altering the deed, it carries it out effectually. I think, therefore, that there has been no material alteration such as would make the deed produced a different deed from the deed registered, and so avoid it.

With regard to the registration, I can see no provision in the statute with regard to registration which has not been complied with. The counsel for the official receiver in their argument relied on sub-s. 1 of s. 6. They relied on the words "a true copy of the deed and of every schedule or inventory thereto annexed or therein referred to." Now, in my opinion, these words mean a schedule or inventory existing at the time of the registration of the deed, and do not mean that the schedule or inventory must necessarily be complete. For these reasons, I think the appellant has a locus standi, and if so he is a person aggrieved and is entitled to raise the point that there is no sufficient petitioning creditor's debt on which to found the receiving order.

Appeal allowed.

Solicitors for appellant: *Burn & Berridge, for Trapnell.*
Solicitor for respondents: *Solicitor to Board of Trade.*

E. L.

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May 1.

[IN THE COURT OF APPEAL.]

THE CONSETT WATERWORKS COMPANY *v.* RITSON.

Waterworks Company—Inclosure Act—Separate Ownership of Surface and Minerals—Compulsory Purchase—Right to work Minerals—Damage to Waterworks—Right of Support—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 18, 22, 23.

APPEAL of the defendant from the judgment of the Queen's Bench Division (Cave and A. L. Smith, JJ.), reported ante, p. 318.

Upon the opening of the appeal it was agreed that the question of the interpretation of the Lanchester Inclosure Act, 1773, should be first argued, as in the event of the appellant succeeding upon that point the questions raised under the Waterworks Clauses Act, 1847, would become immaterial.

Under the special circumstances of the case it is considered unnecessary to state more than the result of the judgment of the Court.

Rigby, Q.C., and *Danckwerts* (*Sir R. Webster, A.G.*, with them), for the appellant.

Sir H. James, Q.C., and *J. G. Wood* (*H. F. Manisty*, with them), for the respondents.

THE COURT (Lord Esher, M.R., Lindley, and Lopes, L.JJ.) were of opinion that the Lanchester Inclosure Act, 1773, was so special and definite in its language that they could come to no other conclusion than that it gave to the Bishop and his assigns the right to work the mines so as to let down the surface of the land without paying damages or making compensation to the allottees, and therefore reversed the judgment of the Court below.

Appeal allowed.

Solicitors for plaintiffs: *Harvey & Capron.*

Solicitors for defendant: *Crossman & Prichard, for Philipson, Cooper, & Goodger, Newcastle-on-Tyne.*

W. J. B.

[IN THE COURT OF APPEAL.]

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May 9.

SMITH, APPELLANT; THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF THE PARISH OF BIRMINGHAM, RESPONDENTS.

Poor-rate—Small Tenements let by the Week—Rateable Value—Deductions—"Voids" and Losses of Rent—Cost of Collection—Hypothetical Tenant—6 & 7 Wm. 4, c. 96, s. 1.

The appellant was assessed to the poor-rate as owner of a small house let by the week at a rent of five shillings, the landlord paying all outgoings. On appeal against the rate to quarter sessions the appellant claimed that, in arriving at the gross estimated rental, deductions should be made in respect of losses by reason of such houses often remaining unlet and void for some time, and by reason of losses of rent through inability of the tenants to pay, and in respect of the necessary cost of collection of the rent actually received. The recorder, however, refused to allow such deductions, and confirmed the rate. The recorder found, in a case stated on appeal from sessions, that it was practically impossible to let the house on any other terms than those on which the appellant let it; but, assuming for rating purposes that a tenant from year to year could be obtained, the house could be reasonably expected to let from year to year at a rent of 13*l.* (which sum amounted to fifty-two times the amount of the weekly rent), the landlord paying all usual tenants' rates and taxes and water-rates. But he found that with respect to house property of that description, whether let by the week or year, the landlord would be unable, by reason of "voids" and of losses by reason of nonpayment of rent, to collect more than 95 per cent. of the rent and that he would have to pay 5 per cent. as the cost of collecting the rent actually received:—

Held (affirming the decision of the Court below), that the recorder must be taken to have found as a fact that 13*l.* was the rent which a tenant from year to year as above-mentioned could reasonably be expected to give for the house; that there was nothing in the further facts found by him to shew that such finding was unreasonable or not justifiable in point of law, and therefore such finding was conclusive of the fact; and, that being so, that the appellant was not entitled to any of the deductions claimed, inasmuch as the test of gross estimated rental is the rent which a tenant from year to year would agree to give, and not the sum which the landlord ultimately receives.

APPEAL from the judgment of the Queen's Bench Division (Wills and Grantham, JJ.) affirming an order of sessions dismissing an appeal against a poor-rate.

The facts, which are fully set out in the report of the case in the Court below (ante, p. 211), appear sufficiently for the purposes of this report from the head-note.

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Jelf, Q.C., and *A. Glen* (*W. Wills*, with them), for the appellant. The recorder has obviously arrived at the sum of 13*l.* as the yearly rent by multiplying five shillings, the weekly rent of the house, by 52. It is clear from the way in which the case is stated that the recorder did not intend that the Court should be concluded by that as a finding of actual fact, but that he intended it to be treated as a mere inference from the other facts, which it should be open to the Court to review, if they should think it wrong in point of principle. It is contended that, having regard to the other facts which he finds, it is not correct in principle to assume that a tenant from year to year would give fifty-two times the weekly rent. The recorder finds that premises of this kind would often be vacant during the year, and that the average loss through "voids" and nonpayment of rent would be 5 per cent. Surely it is obvious that a person bargaining with the landlord for a tenancy from year to year would take this into account, and that it cannot therefore be a reasonable mode of estimating the yearly rent to assume that he would give the landlord fifty-two times the weekly rent. The Parochial Assessment Act no doubt makes the rent which a tenant from year to year would give the test; but it is found in the case that it is impossible to let houses of this kind by the year, and therefore there cannot be an actual tenant from year to year. It is therefore necessary to ascertain what rent a hypothetical tenant from year to year would give by a sort of cy-près doctrine. It is contended that the only practical mode of making a reasonable estimate of such rent is to see what the landlord actually would get in a year for the house. It is not contended that these matters, such as "voids," losses, and cost of collection, are the subject of deduction from the gross hypothetical rent when it is arrived at, but that they must be considered in arriving at the amount of such hypothetical rent. They cited *Smith* v. *Mayor, &c., of Birmingham* (1); *North and South Western Junction Ry. Co.* v. *Brentford Union.* (2)

Sir R. E. Webster, A.G., and *Alfred Young* (*Hugo Young*, with them), for the respondents. The finding of the recorder cannot mean that he arrives at the sum of 13*l.* merely as the multiplication of five shillings by 52. The weekly payments cannot

(1) 11 Q. B. D. 195. (2) 60 L. T. (N.S.) 274.

be the measure of the yearly value. There is no relation between fifty-two times five shillings a week and a yearly rent of 13*l.* In the case of a weekly tenancy the landlord gets his money week by week, and a yearly rent of 13*l.* is not the equivalent of fifty-two sums of five shillings received weekly. The case is really stated to raise the question whether, where house property can only be let by the week, the rating authority is bound to take as the basis of rateable value a sum less than fifty-two times the weekly rent, because the property will in some weeks be vacant, and there will be losses of rent and expenses of collection. The point raised at sessions and in the court below, as stated in the 4th paragraph of the case, was that the hypothetical tenant in the case of such property as this must for the purpose of ascertaining the gross estimated rental be deemed not to occupy personally but to sub-let the tenements to weekly tenants as occupiers, himself paying all outgoings, and that on that ground the deductions contended for should be made in arriving at the gross estimated rental. But that mode of estimating the gross value is wholly contrary to the Parochial Assessment Act. The test is what a tenant from year to year occupying the premises would give, not what a landlord would ultimately receive. The recorder has found that the rent a tenant from year to year would give is 13*l.*, and there is nothing in the facts as stated in the case to shew that the finding is unreasonable or wrong in point of principle.

Jelf, Q.C., in reply.

LORD COLERIDGE, C.J. In this case we have to do what Courts have from time to time in such cases complained of having to do, viz., to apply the terms of the Parochial Assessment Act to a subject-matter to which they are not really applicable. It has been pointed out in the court below that the terms of the Act are really not applicable to a number of very valuable rateable properties, which have come into existence since the Act was passed, and which therefore were not in the contemplation of the legislature in passing it, such as railways and gasworks. In such cases the hypothesis of a tenancy from year to year is really inapplicable. How can it be supposed that any one would

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become tenant from year to year of an isolated portion of a railway? What is true of great properties, such as railways, may also be true of smaller matters; and it is found that this tenement of the value of five shillings a week is not capable of being let on a tenancy from year to year, but can only be let on a tenancy from week to week at a weekly rent. Therefore here, too, we have to apply to what is undoubtedly a rateable subject-matter a test which is in reality inapplicable. By the terms of the statute the matter to be ascertained is at what rent this tenement might reasonably be expected to let from year to year upon the hypothesis that it could be so let, a somewhat difficult problem when such hypothesis is in fact found to be an impossible one. Under these circumstances one must get at the amount of such rent in the best way one can, applying the principles of the law of rating as far as they can be made applicable. The learned recorder who had this problem before him has found as follows: he has found that the weekly rent of the tenement taken as a test case is five shillings, but that from one cause or another, such as the migratory habits or tenuity of means of the class of persons who occupy them, such tenements will be vacant during some portion of the year, and the rent will not be received for every week; and consequently the landlord will not get the full sum of 13*l.*, but on an average will only get 95 per cent. of it. It is argued that, having regard to that finding, the recorder was manifestly wrong in point of law in assuming that fifty-two times five shillings was the rent that a tenant from year to year could reasonably be expected to give for such a tenement, if such a tenant could be found. I cannot myself see how in any view of the law we can come to the conclusion, as a legal proposition, that his finding cannot be maintained. I do not think he meant anything but what he has said, viz., that taking all things into account, 13*l.* a year is the rent which in his judgment a tenant from year to year would be willing to give, assuming that such a tenant could be found. That is the conclusion at which he arrives in point of fact. It is said that that cannot be so, because he finds in the rider, which he added to the case when it was sent back to him to re-state, that, with respect to house property of this description, whether let by the week or the year, the landlord

would be unable by reason of "voids" and of losses by non-payment of rent to collect more than 95 per cent. of the rent. It was argued for the appellant, and I must own I was at first impressed by the argument, that, the recorder having found that on an average of years the landlord would not receive more than 95 per cent. of 13*l.*, as a matter of true inference only 95 per cent. of 13*l.* was the amount of the rent which a tenant from year to year could reasonably be expected to give. I am not even now prepared to say that that consideration is without weight, and that there may not be some small amount of hardship occasioned to the landlord in this case by our decision. It is, however, clear on principle that it is not what the landlord ultimately receives, but what the tenant from year to year may reasonably be expected to give, which must be looked to as the test. It does not follow, because under certain circumstances and in certain places the landlord would only get 95 per cent. of what the occupation is worth, that a man dealing with him would not agree to give as rent what it was worth. If the occupation of the premises is worth 13*l.* a year, it is not because there may be certain onerous incidents affecting the particular class of property, which prevent the landlord from ultimately realising that amount in full, that we can say that a tenant would not agree to give that amount. What ultimately reaches the landlord's pocket is not the test under the Act, but what rent the tenant would agree to give subject to the statutory deductions. In this case the recorder has found that 13*l.* is the gross annual value, that is to say, the rent which a tenant from year to year, assuming that such a tenant could be found, might reasonably be expected to give for the premises, the landlord paying all usual tenant's rates and taxes. As I understand, the only questions in the case are whether that has been properly found by him, and whether the deductions contended for by the appellant ought to be made. It seems to me that our decision must proceed on the footing that the gross annual value is 13*l.* The finding of the recorder on that question seems to me to be a finding on a question of fact which is concluded by such finding. Then the question is whether, that being so, the deductions claimed in respect of "voids," losses of rent, and expenses of collection, are admissible. I do not think these matters can be

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made the subject of deduction, because a tenant from year to year would not consider and would have nothing to do with them. It is not what the landlord ultimately receives, but what the tenant would agree to give, that is the test. For these reasons I think the decision of the Queen's Bench Division was right, and should be affirmed.

LINDLEY, L.J. I am of the same opinion. The problem involved in this case is one of some difficulty, because the statute compels the application of an unreal test. The provisions of the Parochial Assessment Act are stringent. It provides that no rate shall be of any force unless it is made upon an estimate of the net annual value of the hereditament rated, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom certain matters specified by the Act. The difficulty here is that it is found as a fact that nobody would take this property as a tenant from year to year. It is, therefore, necessary to treat the case hypothetically as best we can. The recorder has found that a tenant from year to year, assuming such a tenant could be found, could be reasonably expected to give a rent of 13*l.* Why are we to say that that finding must be wrong? The counsel for the appellant says that, having regard to other facts found by the recorder, the true inference from which it was intended that we should be at liberty to draw, we ought to come to the conclusion that his finding as to the estimated yearly rent in point of law cannot be correct. I cannot see my way to going that length. What we know is that in fact the premises were let by the week at five shillings a week, which multiplied by 52 would amount to 13*l.*: and we are further told that the appellant owns other houses, and, if an average is taken on all the houses, he gets 95 per cent. only of the rents. There seems to me considerable danger of being misled in applying such average calculations to any particular house. There is no finding here that this particular house was not constantly let. Unless we are driven to say judicially that, though this tenement is let at five shillings a week, because on an average of such tenements they

will be more or less unlet during the year, therefore the yearly value of the particular tenement cannot be 13*l.*, I do not see how we can interfere with the finding of the recorder. I do not see that we are driven to that conclusion. If we are to speculate on the matter, it seems to me that there is fair ground for saying on the facts that it is not improbable that a tenant from year to year would give a rent of 13*l.*, if such a tenant could be found: and therefore I do not see how we can say that the finding of the recorder to that effect is wrong.

LOPES, L.J. We are asked several questions in the case, of which the material questions appear to me to be the first three. The first question is, what is the proper hypothesis to be made in applying the Parochial Assessment Act to a tenement of the description in question? The answer I give to that question is that the gross estimated rental is to be found by ascertaining the rent at which the hereditament might reasonably be expected to let to a tenant in actual occupation from year to year. Then what is that rent in the present case? The recorder has found that the rent a yearly tenant could be reasonably expected to give, the landlord paying the usual tenant's rates and taxes, is 13*l.* The appellant's counsel ask us to say that that finding is wrong, because the recorder has arrived at that amount by multiplying the weekly rent by 52. It seems to me that, so far from being wrong, that was a reasonable finding. At any rate, I am clear that there is nothing in the finding or in the facts before us to enable us to say that it was wrong. I do not see why it was unreasonable for the recorder to draw the inference from the fact that the tenant actually in possession paid five shillings a week that a tenant from year to year would pay 13*l.* I do not see anything improbable in that, because it must be remembered that the tenant from year to year would have the sums that a tenant from week to week would have paid weekly longer in his pocket. I do not think that the finding of the recorder as to the amount of the yearly value can be disregarded, as suggested by the appellant's counsel. It is true that the statutory hypothesis which we are compelled to apply is often difficult of application, but I think that it is not so difficult of application in this case as in many

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others. The second question is, whether the appellant is entitled to the deduction of 5 per cent. on account of "voids" and losses. I am clearly of opinion that no such deduction in respect of "voids" can be made, because any such deduction would be contrary to the hypothesis on which we are bound to proceed, viz., that there is to be assumed to be a tenant occupying from year to year. The third question is, whether the appellant is entitled to the deduction of 5 per cent. for collection. Again, I say he is not entitled to any such deduction. It is not the amount which the landlord ultimately receives that is the test. The test is the rent which the tenant may reasonably be expected to give subject to certain deductions specified by the Act. For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Ross & Norman Douglas, for A. L. Crockford.*

Solicitors for respondents: *Sharpe, Parkers, & Co., for W. Horton & Redfern.*

E. L.

Feb. 15.

[IN THE COURT OF APPEAL.]

GREAT BRITAIN 100 A 1 STEAMSHIP INSURANCE ASSOCIATION *v.* WYLLIE.

Insurance (Mutual)—Mutual Marine Insurance Association—Policy effected by one of co-Owners of Ship as Agent for all—Contributions to Losses—Liability of other co-Owners.

The plaintiffs were a mutual marine association, being registered under the Companies Act, 1862, as a company limited by guarantee. The defendants were some of the part owners of a steamship. Hornstedt, to whom the other shares of the ship belonged, was the managing owner, having authority to insure the ship in such an association as that of the plaintiffs, and he insured it with them by a policy for 1000*l.* Hornstedt traded as Hornstedt & Garthorne. The policy stated that Hornstedt & Garthorne, "as well in their own names as for and in the names of all and every person and persons to whom the same may appertain, in part or in all, subject to the provisions hereinafter contained," insured the ship in the sum of 1000*l.* for a year, the charges of the insurance to be borne by members of the association having ships entered in the association, in proportion to the sums assured therein, and the assurers thereby bound themselves to the assured for the true performance of the premises, the consideration due unto the assurers for the insurance being the contributions

to be paid from time to time by the assured for losses and averages on other steamships mutually insured in the association, and other costs and charge of the association at the rates per cent. to be determined by the committee. And it was mutually agreed between the assured and assurers that all the rules of the association, whether set out in the policy or indorsed thereon or otherwise, should be as binding on the assured and assurers as if they had been inserted in the policy and had formed part thereof. The rules were indorsed on the policy. The memorandum of association of the association stated its objects to be "the insurance of steamships belonging to members of the association, or in which members of the association are interested, or have a share or shares." The articles of association provided that "every person shall be deemed to have agreed to become a member of the association who insures any ship, or share or shares in a ship, in pursuance of the regulations herein contained." The first rule was, "the members of this club shall mutually insure each other's steamships, or shares therein, in such manner and against such loss and damage as are hereinafter mentioned." Hornstedt having become bankrupt, an action was brought against the defendants, the other co-owners of the ship, to recover contributions according to the rules to losses in respect of other ships insured with the association during the currency of the policy:—

Held (affirming the judgment of Day, J.), that the defendants were liable, for whether they had or had not become members of the association, they had by the policy expressly contracted with the association that they would be liable for contributions to losses in respect of other ships insured with the association in accordance with the rules, just as if they had been members, and that such a contract was within the authority of the managing owner, and within the powers of the association.

United Kingdom Mutual Steamship Assurance Association v. *Nevill* (19 Q. B. D. 110) distinguished.

Ocean Iron Steamship Insurance Association v. *Leslie* (*post*, p. 722) approved and followed.

APPEAL by the defendants against the judgment of Day, J., at the trial of the action without a jury.

The plaintiffs were a mutual marine insurance association or club, and they sued the defendants, as part owners of a steamship, called the *Orchis*, which was insured with the association, for calls or contributions made by the plaintiffs in respect of the insurance of that vessel to meet losses incurred in respect of other vessels insured with the association.

The association was a company limited by guarantee, and incorporated by registration under the Companies Act, 1862. The memorandum of association stated (4) that "the objects for which the association is established are: (1) The insurance of steamships belonging to members of the association, or in which

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members of the association are interested, or have a share or shares."

The articles of association contained the following clauses:—

(3.) "Every person shall be deemed to have agreed to become a member of the association who insures any ship or share or shares in a ship in pursuance of the regulations herein contained." By clause 9 seven days' notice at least, specifying the place, day, and the hour of meeting of any general meeting of the members, and in case of special business the general nature of such business, was to be given to the members in manner therein mentioned. (16.) "Every member shall have one vote for each steamer entered by him or his firm, up to six and no more. (17.) "No member shall be entitled to vote at any meeting unless all moneys due from him to the association have been paid." (31.) "The business of the association shall be conducted according to the rules of the association hereinafter set forth, and which rules shall form part of these articles." (32.) "All policies of insurance shall be issued or underwritten in the name of the association, and shall have a copy of the rules indorsed thereon." (33.) "All claims in respect of insurance shall be made and enforced against the association, and not against any member or members thereof." (34) "Every engagement or liability of a member of the association in respect of any insurance shall, for all purposes relating to enforcing such engagement or liability, be deemed to be an engagement or liability by or on the part of such member to the association, and not to any other member or members." (37.) "A notice may be served by the association upon any member either personally or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode."

The rules of the association contained the following provisions:—

(1.) "The members of this club shall mutually insure each other's steamships, or shares therein, in such manner and against such loss and damage as are hereinafter mentioned." (2.) "The insurance (excepting as hereinafter mentioned) is against perils of the sea, &c. . . . and in case of any loss or misfortune it shall be lawful to the insured, their factors, servants, and assigns, to sue, labour and travel for, in, and about the defence, safeguard, and recovery of the subject-matter of the insurance, or any part thereof,

without prejudice to the insurance, the charges whereof the members having ships entered in this club shall bear in proportion to the sum insured in the club." (25) "The committee shall meet at least once a month for the settlement of claims, and for such claims as they may pass, and for other contributions payable under these rules, the managers shall draw on the members at one month, the members' respective proportions of such claims being calculated according to their several interests entered in this club at the time of such claims accruing." (31) "A member shall be uninsured in respect of any ship or his share therein: (*a*) From the date of the legal transfer of the ship; (*b*) if he do not pay when due and demanded any amount payable by him; (*c*) if his ship, or share therein, be mortgaged or assigned at or after entry, unless, before a claim accrues, an approved undertaking, registered by the managers, has been given to pay all contributions due and to become due; (*d*) if he becomes bankrupt or insolvent, unless, before a claim accrues, an approved undertaking, registered by the managers, has been given to pay all contributions due or to become due."

The steamship *Orchis* was owned by several co-owners. C. A. Hornstedt was the owner of $\frac{48}{64}$ths. The remaining shares belonged to the defendants. Hornstedt was the managing owner, and he had authority from his co-owners to insure the vessel in mutual clubs. No special authority was given to him to insure in the plaintiff association, the name of which was not known to his co-owners. On March, 16, 1886, a policy of insurance upon the vessel was effected by Hornstedt (who traded as Hornstedt & Garthorne) with the association. The policy was headed with the name of the association, and the material parts of it were as follows: "Know all men that Hornstedt & Garthorne, as well in his or their own name or names, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, subject to the provisions hereinafter contained, doth make assurance, and cause himself or themselves, and them and every of them to be insured, lost or not lost, from the 20th February, 1886, at noon, until the 20th February, 1887, at noon, in the sum of 1000*l.*," upon the steamship *Orchis*, ... "touching the adventures and

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perils which we, the assurers, are contented to bear and do take upon us; they are of the seas, &c., ... and in case of any loss or misfortune it shall be lawful to the assured . . . . to sue, labour, &c., for, in, and about the defence, safeguard, and recovery of the subject-matter of the insurance, or any part thereof, without prejudice to the insurance, the charges whereof the members having ships entered in this club shall bear in proportion to the sum assured in this club. . . . . And so we, the assurers, are contented, and do hereby promise and bind ourselves to the assured, their executors, administrators, and assigns, for the true performance of the premises; the consideration due unto us, the assurers, for the said insurance, being the contributions to be paid from time to time by the assured for losses and averages on other steamships mutually insured in the above-named association, and other costs, charges, and expenses of the association, at and after the rates per cent. to be determined by the committee thereof. And it is mutually agreed between the assured and assurers that all the rules of the said association, whether set out herein, or indorsed hereupon, or otherwise, shall be as binding upon the assured and assurers, and that as fully and effectually to all intents and purposes as if such rules were inserted in this policy, and formed part thereof." The policy was sealed with the seal of the association, and signed by the manager. The rules of the association were indorsed on it with a statement that "these rules are subject to the memorandum, and form part of the articles of association."

In July, 1886, Hornstedt became bankrupt.

Day, J., held that the defendants had become members of the association, and as such were liable for the contributions claimed.

The defendants appealed.

Barnes, Q.C., and *Joseph Walton*, for the appellants. The association was established only for the mutual insurance of ships or shares of ships belonging to members. The defendants were not members, and did not by virtue of the policy become members of the association. They never authorized Hornstedt & Garthorne to make them members, or to render them liable to pay contributions. Under the terms of the policy only Hornstedt &

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Garthorne became members, and they only are liable to pay contributions, though the other co-owners are entitled to the benefit of the insurance through the managing owners. "Members" of the association must be persons who could have been registered as members under the provisions of the Companies Acts. The articles of association and the rules of the association shew that it was ultra vires for the association to enter into a contract of insurance with persons who are not members, and therefore the defendants are not bound by the contract, even if they can be taken to have entered into it. But the case is governed by the decision of this Court in *United Kingdom Mutual Steamship Assurance Association* v. *Nevill* (1), which shews that only the managing owners are liable. The defendants are not parties to the contract under the description of "the assured." The word "assured" in this policy includes only members; it means Hornstedt & Garthorne. The rules are expressly incorporated in the policy. The case is distinguishable from *Ocean Iron Steamship Insurance Association* v. *Leslie* (2). At any rate that, being a decision of Mathew, J., is not binding on this Court.

Bucknill, Q.C., and *C. C. Macrae*, for the plaintiffs, were not heard.

LORD ESHER, M.R. The action is brought by a mutual marine insurance association against part owners of a steamship called the *Orchis*, upon a policy effected on the ship by Hornstedt & Garthorne, the managing part owners, to enforce payment by the defendants of contributions which are alleged to have become due from them by reason of the loss of other steamships insured with the same association. Day, J., held that the defendants were liable. They have appealed, and the appeal is supported on several grounds. It is said—(1) that Hornstedt & Garthorne had no authority in fact from the defendants to enter into the policy; (2) that, even if they had, yet by the terms of the policy itself, and the articles of association and rules of the association, the defendants are not liable. It is said that they are not liable upon the terms of the policy itself, and, moreover, that it was ultra vires the association to grant such a policy to such persons

(1) 19 Q. B. D. 110. (2) Post, p. 722.

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as the defendants. With regard to the authority of Hornstedt & Garthorne to enter into the policy, I think there cannot be any doubt. It is admitted that they had authority to insure the ship with mutual clubs, and it follows that they had authority to enter into this policy with this club or association. Assuming, then, the authority of Hornstedt & Garthorne to enter into the policy, did the policy bind the defendants to anything, and, if so, to what? The memorandum of association of the plaintiffs shews that they are a mutual insurance association, established for the purpose of insuring "steamships belonging to members of the association, or in which members of the association are interested or have a share or shares." It is said that they had only authority to enter into a policy with members of the association, and that the defendants whose names do not appear in the policy, are not members, and that, consequently, no policy has been entered into with them. The policy begins in the old and well-known form of a Lloyd's policy. It provides that "Hornstedt & Garthorne, as well in his or their own name or names, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, subject to the provisions hereinafter contained, doth make assurance, and cause himself or themselves, and them and every of them, to be insured" upon the ship *Orchis*. It is said that persons whose names are not stated in the policy, if they have any interest in it, are undisclosed principals; that the contract was made with Hornstedt & Garthorne, and that the defendants can be sued only as undisclosed principals. But it has been settled for many years that, under a Lloyd's policy commencing in this form, the underwriters do not only enter into an agreement with the persons named in the policy, but that they also agree directly with the other persons on whose behalf the insurance is effected, though their names do not appear in the policy. The words of the policy indeed seem to go to that extent, just as if the defendants had been named as parties—"as, for, and in the names of all and every other person or persons to whom the same doth, may, or shall appertain." The policy must be construed just as if the names of the defendants had been stated in it as parties. The persons on whose behalf such a policy is so entered

into are the "assured," and when the expression "assured" is used in such a policy it includes persons whose names do not appear in the policy. The policy goes on: "So we, the assurers, do hereby promise and bind ourselves to the assured for the true performance of the premises, the consideration due unto us, the assurers, being the contributions to be paid from time to time by the assured for losses and averages on other steamships mutually assured in the above-named association." The word "assured" includes persons whose names are not stated, but are taken to have been stated. There is in the policy an express contract by the "assured," which includes the defendants, to pay the contributions due under the rules of the association in case of the loss of other ships insured with the association. So far, therefore, as the policy goes, there is an express undertaking by the defendants to pay these contributions.

But then it is said that, by the rules of the association, such a policy can be entered into only with members of the association, and the defendants are not members; therefore, the contract is ultra vires, and does not bind the association, and consequently the defendants are not bound. It is not necessary on the present occasion to determine whether the defendants are members or not. There would be some difficulty in saying that they are not members for some purposes, for one of the articles of association says that every person who insures any ship or share in a ship shall be deemed to have agreed to become a member of the association, though no doubt another rule appears to require something more than this to constitute a member. It may be that the defendants are members for the purpose of paying contributions, though not for the purpose of voting, and that they are not liable to contribute to the expenses of the association other than in respect of losses of other ships insured. I do not intend to decide this question. It is sufficient for the present purpose to say that, even if the defendants are not members of the association, still, according to the view of Mathew, J., in *Ocean Iron Steamship Insurance Association* v. *Leslie* (1), with which I entirely agree, the defendants are liable to pay the contributions claimed. In that case Mathew, J., said (2): "If you assume the object of the

(1) Post, p. 722. (2) Post, p. 727.

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association to be to insure ships and to protect their owners, how can it be said to be ultra vires to stipulate that the owners shall be liable for the premiums on the ships insured with the association? The argument is an impossible one, and, as soon as the true character of the insurance came to be considered, it was clear that it could not be adopted. The contract with Johnson alone, assuming him to be only managing owner, without any interest in the ship, would, unless he was authorized to represent the owners, be null and not binding on him. It would be a wagering policy, a policy with no interest, under which nobody could recover. The object of the insurance is not to protect the agent, or to make contracts with agents who choose to insure particular ships, calling themselves agents, but to insure the owners of the ship. If you once arrive at that as the clear meaning of the parties, what can be more within the powers of the association, more equitable, or more clearly right, than that the association should stipulate that it should have a right to look to the real persons protected by the insurance, and not to an agent, in the event of that agent's insolvency? In that view of the matter it appears to me that the construction of the policy must be against the defendants."

I entirely agree with those observations. I agree that, whether the defendants are members or not, it is a necessary implication from the terms of the memorandum and articles, which form the constitution of the association, that the association had power to enter into a policy for the purpose of mutual insurance with the defendants, and to agree with them that they should make contributions in respect of the loss of other ships mutually insured with the association. Whether the defendants are or are not members of the association for all purposes seems to me immaterial. They entered into an express contract with the association, which they had power to make, and which the association had power to make; there was, therefore, sufficient mutuality, and the policy binds the defendants.

It is said, however, that the case is governed by the decision of this Court in *United Kingdom Mutual Steamship Assurance Association* v. *Nevill*. (1) In my opinion that case is not in point.

(1) 19 Q. B. D. 110.

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The distinction was so fully and clearly explained by Mathew, J., in *Leslie's Case* (1), that it is very difficult to add anything to what he said. He shewed that, if the policy had not been entered into with a mutual association, there could be no doubt about its meaning. He pointed out the difficulties which had arisen in the case of mutual insurance clubs, and the way in which those clubs had endeavoured to escape from the difficulty which was imposed on them by their being brought under the provisions of the Companies Acts. In *Nevill's Case* (2) the policy was expressed in a form which made only the person who was a party to it by name liable upon it. In that case the association had departed from the ordinary well-known form of policy, with all the rights and liabilities incident to it as determined by a long course of decisions, and instead of it they had made a policy which could not be construed according to Lloyd's form of policy and the ordinary law. But, as Mathew, J., pointed out, after the decision in *Nevill's Case* (2), the mutual insurance association saw the effect of what they had done, and they then went back to the old form of Lloyd's policy, adapting it to the case of payment of mutual contributions. It has been argued that the policy in the present case is different in form from that which was used in *Leslie's Case.* (1) But the essential parts of the policies in both cases are the same. Unless we are prepared to overrule the decision of Mathew, J., it is that case and not *Nevill's Case* (2), which must govern the present case. So far from overruling the decision of Mathew, J., I think that his judgment is a most admirable and valuable one, and I entirely agree with it. It shews that the defendants are liable on this policy by reason of their express contract, the policy not being ultra vires. The appeal must be dismissed.

BOWEN, L.J. The association are suing the defendants, who are part owners of a ship, on a policy of insurance upon the ship, for contributions alleged to be due from the defendants for losses and averages in respect of other ships insured with the association. The policy was effected by the managing part owners of the ship; the action is brought against the other part owners.

(1) Post, p. 724. (2) 19 Q. B. D. 110.

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The liability of the defendants must depend on the terms of the policy. It is suggested by the plaintiffs that the policy contains an express contract by which the defendants bound themselves to pay these contributions. That is a question of construction. It is important to observe that a large part of the policy is in the ordinary form of a Lloyd's policy, and it would be a mere trap if the plaintiffs' construction of it were not the right one. The policy begins by stating that Hornstedt & Garthorne are assuring the ship "as well in his or their own name or names, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all." In a policy so framed what is the meaning of the word "assured" when it follows such an opening? In every policy which anyone familiar with such matters has ever seen the word "assured" (unless there is something to limit its meaning) means the persons whose interests are to be protected by the policy. With that explanation I come to the clause on which everything turns—"So we the assurers do hereby promise and bind ourselves to the assured for the true performance of the premises, the consideration due unto us, the assurers, for the said insurance being the contributions to be paid from time to time by the assured." The word "assured" means the persons who are interested in the ship, including the defendants. If the words had stood thus in the policy—"by the persons interested in the ship"—could it be doubted, having regard to the business nature of the transaction which the policy purports to complete, that the defendants would have undertaken to pay the assurers their contributions? If so, the defendants are clearly liable, unless there is something else in the policy which cuts down their liability. The only thing which can have that effect is the proviso that the rules of the association are to apply, and in those rules it is no doubt assumed that the persons who will insure ships will be members of the association. But can it be said that the rules cut down the meaning of the clear words of the policy, that contributions are to be paid by the "assured"? There are only two ways of escaping from those words, (1) by saying that the "assured" do not bind themselves at all, in which case there would be no consideration for the policy; or (2) that all the

assured are not bound to pay contributions. Both those points appear to me untenable, and, therefore, on the ground that there is an express contract by the "assured" to pay the contributions, it appears to me that the appeal must fail.

It is said, however, that, as the rules of the association provide only for the payment of contributions by members, such a policy as this would be ultra vires the assurers. But it is clear that the business of the association, as defined by their memorandum, is to insure ships "in which members of the association are interested or have a share or shares," and not only ships or shares of ships belonging to members of the association. It is not necessary to decide whether the defendants are members of the association; the question is, whether they have bound themselves to pay these contributions, and in my opinion they have.

Is there any authority contrary to this view of the law? I think not. *Nevill's Case* (1) was an entirely different one. Then the policy treated Tully, the managing owner of the ship, as alone contracting with the association; it did not purport to be made on behalf of any one else. The association had contracted themselves out of the power of saying that any one but Tully was liable to them. The form of the policy here is quite different, and the case is really exactly like *Leslie's Case* (2) as soon as you arrive at the proper construction of the opening clause. The difference between the policies in the two cases does not amount to any legal distinction. The judgment of Mathew, J., is very clear and very valuable, and in my opinion it laid down the law correctly.

FRY, L.J. I am of the same opinion. If the defendants are liable on the policy, they must be liable either as members of the association or by reason of an express contract. I doubt whether they could be held liable as members. But then arises the inquiry, whether the defendants are not liable by reason of the express contract in the policy, and I am clearly of opinion that they are. If one looks at the constitution of the association as defined by the memorandum, I think one would expect that they would enter into such a contract as is contained in this

(1) 19 Q. B. D. 110. (2) Post, p. 722.

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policy. The memorandum of association provides, as it seems to me, for the insurance of the entire interest in a ship or the whole value of the shares of a ship under three categories—(1) where members of the association own the whole interest in a ship; (2) where other persons who are not members own some of the shares in a ship; (3) where members have some interest in a ship without having any shares. The memorandum contemplates the insurance of the interests of persons who are not members of the association. In the case of mutual insurance by members of ships or shares of ships belonging to members, the contract might very well be worked out merely by means of the membership. But in the case of an insurance by the members of shares or interests belonging, not to a member, but to an outsider, you would expect that the outsider would enter into some express contract to be liable to pay contributions in the same way as if he had been a member. And this is exactly what we have in the present case. The policy is in the ordinary Lloyd's form, and I can entertain no doubt that the word "assured" in it means all the persons interested in the ship. I think, therefore, that the defendants have by express contract rendered themselves liable to pay their contributions.

Appeal dismissed.

Solicitors; *Wynne, Holme, & Wynne, agents for Forshaw & Hawkins, Liverpool; Lowless, Nelson, & Co.*

W. L. C.

OCEAN IRON STEAMSHIP INSURANCE ASSOCIATION (LIMITED) *v.* LESLIE.

NEWCASTLE ASSIZES, JULY 22, 1887.

Action against part-owners of the steamship *Howick* to recover contributions in the nature of premiums in respect of the insurance of that ship.

The action was tried by Mathew, J., with a jury.

The plaintiffs were an association for the purpose of mutual insurance of iron steamships. William Johnson was part owner and manager of the steamship *Howick*. He became a member of the plaintiff association in respect of that ship, of which the defendants were part-owners, and effected a policy on the ship under the rules of the association. He had become bankrupt.

The memorandum of association of the plaintiffs stated that the association was established for the "mutual insurance of iron steamships insured with the company by members of the company."

The articles of association contained the following clauses:—

(2.) "Every person shall be deemed to have agreed to become and to be a

member of the company, who in his own name, or in his name as agent, insures any ship in pursuance of the regulations of the company.

"(18.) Every contract of insurance shall be by a policy in such form as the directors shall from time to time determine."

"(36.) The funds required for the payment of claims shall be raised by contributions from all the members in the proportions which the sums insured by them respectively bear to the amount of all the sums insured by the company at the respective times of the losses giving rise to the claims.

The policy in the present case commenced as follows:—

"Be it known that William Johnson (hereinafter called the said person or persons effecting this insurance) as well in his or their own name or names as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain, in part or in all, subject to the provisions hereinafter contained, doth make assurance, and cause himself, or themselves, and them and every of them, to be insured";

and it contained the following clause:—

"And it is mutually agreed between the assured and the company that, without prejudice to the rights and remedies of the company against the said person or persons effecting this insurance, as a member or members of the company in respect of this insurance, the assured shall pay to the company in lieu of premiums all the sums and contributions which the company are entitled to call upon the said person or persons effecting this insurance, as a member or members of the company, to pay to the company in respect of this insurance according to the articles of association of the company, and that the provisions contained in the said articles of association shall be deemed and considered part of this policy, and shall, so far as regards this insurance, be as binding upon the assured as upon the said person or persons effecting this insurance."

Gainsford Bruce, Q.C., and *Strachan*, for the plaintiffs.

Walton, and *Boyd*, for the defendants.

Cur. adv. vult.

1888. July 22. MATHEW, J. This action was brought by the plaintiffs, a mutual insurance association, incorporated under the Joint Stock Companies Acts, against the defendants, who are part-owners of a ship insured with the association, to recover the amount of their contributions; in other words, to recover the premiums payable by the defendants in respect of the insurance of a ship effected with the plaintiff company. Now, it was quite clear, and it was not seriously disputed, that the ship had been insured through a Mr. Johnson, an agent, on behalf of the owners, with the plaintiffs, and insured upon the principle of mutual insurance, whereby the persons insured became liable to contribute to any losses which might be sustained by other members of the association. It was said that the defendants as owners of the ship had had the benefit of the insurance, and had had their ship protected; and that it was to be assumed for the purposes of this part of the case that they had been paid the amount of the premiums, and it was argued that in fairness and in justice they were bound to hand over to the plaintiffs the amount of the contributions which it was admitted they had not paid. On the other hand, it was said that there was a technical answer to the plaintiffs'

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claim. It was said that Johnson, through whom the insurance had been effected, was the person liable, and that the plaintiffs had contracted themselves out of the right to have recourse to anybody but Johnson, and reliance was placed upon some recent decisions, and particularly on *United Kingdom Mutual Steamship Association* v. *Nevill* (19 Q. B. D. 110). Now, for the purpose of this insurance, Lloyd's policy in the old form has been made the basis of the contract, and before dealing with that form of contract in connection with this mutual insurance undertaking, it may be desirable to say a word as to the meaning of a Lloyd's policy. If attention had been paid to that, I think we should have been spared a considerable amount of discussion with reference to the meaning of the policy issued by the plaintiffs. In the ordinary form of Lloyd's policy, though the policy is effected through a broker, the contract is not with that broker, but with the persons interested in the ship. In order that the policy should be effective, and in order that the underwriter should be made liable upon it, the broker must be proved to have been acting for a principal interested in the subject-matter of the insurance, and to have made the contract on his behalf. Without authority to him to effect the policy on the principal's behalf, the policy is a nullity; it is a wager policy only. The essential character of a policy of insurance is that it is a contract of indemnity, and if an agent, or the person whose name is used for the purpose of the contract with the underwriter, were to insert in the policy a provision that he should be deemed to have an interest, or that the policy should be the proof of interest, it is only necessary to refer to the well-known statutes on the subject to shew that the want of real interest would be fatal to the insurance by the agent. It is absolutely necessary to the contract of insurance in the ordinary form that it should be made with persons interested in the subject-matter of insurance. Now, mutual insurance is the simplest thing in the world, if you have not to record it in written documents. It is the most laudable and the most excellent way of effecting insurance, and is a system by which every one insured is at once underwriter and assured. He is entitled to recover for his losses against those associated with him, and they are entitled to contribution from him for any loss sustained by any one of them. This very simple principle was acted on successfully for many years, until technical difficulties began to be interposed. The first technical difficulty was this: all mutual insurance associations were ordered by statute to be incorporated as joint stock companies. The second technicality was, that under statutes framed for different purposes, which were positive in their terms, every contract of insurance had to be recorded in a written document; there must be a policy of insurance. Those two conditions having to be complied with, the mutual insurance associations set themselves to work, by various forms of rules, to endeavour to reconcile the rules of law with the conduct of their business, and different regulations have been adopted to meet the decisions on the subject. Now, in *Nevill's Case* (19 Q. B. D. 110) the Court had before it a series of rules framed to enable the association conveniently to carry out the purposes for which it was constituted—the purpose of effecting the mutual insurance of its members. The principle adopted was this: It

was arranged that the agent was to be taken to be the person insured for all purposes; the association were to look to him for contributions, which contributions he, of course, was to collect from the owners of the ship he represented; while, on the other hand, he was to sue or make a claim on behalf of all the owners for whom he was acting. That was a very simple and a very excellent way of carrying out the purposes of the undertaking until there happened that which people do not ordinarily anticipate, viz., the insolvency of some one connected with the transaction. That happened in *Nevill's Case* (19 Q. B. D. 110). A person named Tully, the managing owner of the ship there in question, stopped payment. At the time when he stopped payment he was largely indebted to the association in respect of the insurance of different ships, particularly of the ship in question. The amount of the contributions in respect of that ship had never been paid by the owners. The insurance association, failing to recover the amount of those payments from Tully, sued the principals, the persons who were bound to place Tully in funds to enable the payments to be made, and they were met with various technical difficulties. It was said that the scheme of the association, and its rules, which were incorporated with the policy, came to this: that the association were to look to Tully alone, and not to his principals. They were described in that case as undisclosed principals—a description which I should hesitate to adopt as strictly correct, because a man may be a principal, and a disclosed principal, although his name is not mentioned. But the owners of the ship were sued by the association upon the footing that they were the persons assured, and, therefore, bound to pay the premiums. The objection was made that, by the terms of the policy and of the articles of association, the plaintiffs had contracted themselves out of the right to go beyond Tully, and had no right to sue the defendants. Now, I entirely concur in the reasoning of Fry, L.J., in that case, with this observation: it appears to me that the conclusion arrived at did not depend only upon the terms of the contract between the association and Tully, but also upon the fact that the assured were parties to that contract. The owners of the ship took the benefit of the contract upon the footing that they were not to be looked to, but that their agent was, for the payment of the contributions. That such an arrangement is not unknown to the law of insurance is clear from what occurs under Lloyd's policy with reference to premiums. Under the ordinary policy the underwriter looks for his premiums to the broker, and not to the assured. That result is brought about in two ways: first, by the insertion in the policy of a receipt for the premiums; and secondly, by the course of business, which treats the broker, not the principal, as the person liable to the underwriter. If that arrangement were set forth in the policy, and it were made part of the contract of insurance in respect of the premiums that the underwriter should look to the broker, nor to the principal, it is clear that that would be operative, and that is practically what was done in *Nevill's Case* (19 Q. B. D. 110). The contract there was, that the premiums should be paid by Tully, and not by the assured. If I am right in the interpretation which I put on the decision in *Nevill's Case* (19 Q. B. D. 110), it is only necessary to compare that case with this in order to see how completely they differ. I need not go

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through the clauses of the articles of association in that case; and I will merely say that I entirely concur in the view taken by Fry, and Lopes, L.JJ., and, as I understand, also by the Master of the Rolls, that the result of the stipulations there was, that the plaintiffs had contracted themselves out of the right to look to the principals. As if in anticipation of the difficulties arising from that decision, we find this clause in the policy upon which the present plaintiffs rely, viz.:—"It is mutually agreed between the assured and the company"—there is no question that "the assured" means the persons interested, the persons for whose benefit the insurance is made, that is the ordinary meaning of the term "assured" in insurance law, and there is no reason for rejecting it, as far as I can see, in interpreting this policy—"it is mutually agreed between the assured and the company that, without prejudice to the rights and remedies of the company against the said person or persons effecting this insurance" (that is against Johnson) "as a member or members of the company in respect of this insurance, the assured" (that is, the persons interested) "shall pay to the company in lieu of premiums all the sums and contributions which the company are entitled to call upon the said person or persons effecting this insurance as a member or members of the company to pay to the company in respect of this insurance according to the articles of association of the company, and that the provisions contained in the said articles of association shall be deemed and considered part of this policy, and shall, so far as regards this insurance, be as binding upon the assured as upon the said person or persons effecting this insurance." That seems to me as clear as the light. The company, not content with the liability of the agent as in *Nevill's Case* (19 Q.B.D. 110), stipulate that they shall be entitled to look to the principals; they emphatically contract that the principals shall be liable to them as well as the agent. That that contract is binding on the principals is clear, not from their having signed the contract, or put their seal to it, but from their being the persons to whom the policy is issued, and who are to have the benefit of it. It was said that this clause was insensible and absurd, and that there was a confusion between the words "assured" and "the persons effecting this insurance." I cannot agree. I think the clause was framed by a man who well knew what he was about, and that any one who reads it carefully will readily follow the object of inserting it in the policy. The main object is to do that which is perfectly right, perfectly equitable, and perfectly fair, viz., to secure that the persons who have the benefit of the contract shall meet their liabilities, and that the company shall not be compelled to have recourse to an agent, who may stop payment, who may abscond, who may die, or who may not choose to assist them. The next objection taken was that the clause was ultra vires. It was said to be ultra vires, because the scheme of this association was that the only persons with whom they should deal were agents, not principals. The principals, of course, were not named; the agent might be either managing owner, with no interest in the ship, or ship's husband. It was said that for all purposes the contract is to be assumed to be a contract between the company and the agent and nobody else. That was insisting on what was impossible according to the rules of commercial

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and insurance law. The parties to a contract of insurance, whether it be mutual insurance or a contract effected at Lloyd's, are the persons interested on the one hand, and the persons underwriting on the other. If you assume the object of the association to be to insure ships and to protect their owners, how can it be said to be ultra vires to stipulate that the owners shall be liable for the premiums on the ships insured with the association? The argument is an impossible one, and as soon as the true character of the insurance came to be considered, it was clear that it could not be adopted. The contract with Johnson alone, assuming him to be only managing owner, without any interest in the ship, would, unless he was authorized to represent the owners, be null and not binding on him. It would be a wagering policy, a policy with no interest, under which nobody could recover. The object of the insurance is not to protect the agent, or to make contracts with agents who choose to insure particular ships, calling themselves agents, but to insure the owners of the ship. If you once arrive at that as the clear meaning of the parties, what can be more within the powers of the association, more equitable, or more clearly right, than that the association should stipulate that it should have a right to look to the real persons protected by the insurance, and not to an agent, in the event of that agent's insolvency? In that view of the matter it appears to me that the construction of the policy must be against the defendants.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Leitch, Dodd, & Bramwell, Newcastle-upon-Tyne.*

Solicitors for defendants: *H. C. Cook & Ball, for H. A. Adamson, North Shields.*

CANADA SHIPPING COMPANY *v.* BRITISH SHIPOWNERS' MUTUAL PROTECTING ASSOCIATION.

April 9, 10, 11; *May* 4.

Insurance (Marine)—Mutual Insurance Company—"Improper navigation"—"Improper stowage."

By the rules of the defendants, a shipowners' mutual insurance association, the plaintiffs were entitled to protection in respect of "damage to goods on board when caused by the improper navigation" of their ship, but were not entitled to claim in respect of "damage caused by improper stowage."

A cargo of wheat while in the hold of the plaintiffs' ship was damaged, owing to a taint communicated to the wheat through the ceiling and limber boards of the vessel having been saturated with a composition which had leaked from the previous cargo. The ceiling and limber boards had not been properly cleaned before the wheat was stowed:—

Held, by Charles, J., that the damage was not caused by "improper navigation:"

Semble, per Charles, J., that the damage was caused by "improper stowage."

Carmichael v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (19 Q. B. D. 242) and *The Warkworth* (9 P. D. 145) considered.

CASE tried by Charles, J., without a jury.

The facts and arguments sufficiently appear in the judgment.

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Barnes, Q.C., and *Carver*, for the plaintiffs.

Cohen, Q.C., and *Joseph Walton*, for the Defendants.

Cur. adv. vult.

CHARLES, J. The plaintiffs in this case are owners of a ship called the *Lake Ontario*, which was entered on the books of the defendants, an association of shipowners, for protection, for the whole amount of her tonnage. Among the risks, events, and occurrences in respect of which, according to the defendants' rules, the plaintiffs were by reason of such entry entitled to protection were the following:—"Loss of or damage to any goods or merchandise or other property, or things on board, or in charge of any ship entered for protection, when such loss or damage has been caused by the improper navigation of such ship or by collision with any substance other than water . . . . damage to or loss of goods or things on any pier or jetty or like structure caused by like improper navigation shall be deemed covered by this clause." The rules also provided that no claim should be made for any damage to or loss of cargo, or other things where the same should have been caused by "improper stowage."

It was proved at the trial that in November, 1884, the *Lake Ontario* carried a general cargo from Middlesborough to Adelaide, consisting of pig-iron, coal, and coke, and of seventy casks of patent liquid coating composition, to be used as paint for machine castings. These casks were stowed on dunnage wood, between the foremast and the main hatch. On May 27 the ship arrived at Adelaide, and a few days later began to be discharged. The iron, coal, and coke were taken out first, and then the casks, some of which it was found had been leaking. A quantity of the composition had escaped into the hold, and had saturated a portion of the dunnage and the ceiling and limber boards of the ship. The whole ship was pervaded with a strong smell of creosote or paraffin. Whilst she was empty the ceiling and limber boards were scraped in the usual way, but no special measures were adopted to get rid of the smell. In June, 1885, she was loaded with a cargo of wheat, to be carried to Dublin. Dunnage wood, including the portion which had been in contact with the composition, was first laid on the ceiling. On the

dunnage was a layer of sacking, and on the sacking the wheat was placed in bags. The ship arrived at Dublin on November 20, and after a few bags had been discharged a complaint was made by the consignee that they smelt of paraffin. The discharge was stopped in consequence, and the plaintiffs bought in the cargo at the market price of undamaged wheat. The bags which had been taken out were replaced, and the cargo was carried to Liverpool, where a careful examination of it was made, and the whole of it was found more or less tainted with the smell of paraffin, and the wheat in some of the bags packed nearest to the ceiling and dunnage was discoloured. The plaintiffs sold the cargo in this condition for the best price they could get, and were losers to the extent of about 2400*l*. This sum they sought in this action to recover from the defendants.

The main point of controversy at the trial was as to the cause of the damage, the plaintiffs contending that it arose entirely, or almost entirely, from the saturated condition of the ceiling and limber boards; the defendants, on the other hand, insisting that it was attributable to the condition of the dunnage wood. It is not necessary for me to examine the evidence in detail on the one side and the other upon this point. It left in the result no doubt on my mind that the state of the dunnage had little or nothing to do with the state of the cargo. The damage in my opinion was attributable to the state of the ceiling and limber boards. They had not been properly cleansed, and the tarry stuff with which they were impregnated tainted the whole cargo.

Two questions now arise for my determination: first, did this damage arise from "improper navigation;" and secondly, if it did, was it also damage caused by "improper stowage?" First, then, I must consider whether it was caused by "improper navigation." Now it was caused by the act of the plaintiffs in putting the goods into a ship which had not been effectually cleaned. She was when loaded unfit to receive a cargo of wheat, and, as might have been anticipated, the wheat was spoiled. That this was improper management can scarcely be disputed. But was it "improper navigation?" It was contended that it was, chiefly upon the authority of *Carmichael* v. *Liverpool Sailing Shipowners'*

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Mutual Indemnity Association. (1) There during the loading of a cargo of wheat a port in the ship's side was insufficiently secured, so that during the voyage water leaked in and damaged the wheat in the lower hold. The leak did not impede the navigation of the ship. It was held, nevertheless, in the Divisional Court and Court of Appeal that there had been "improper navigation" with regard to the safety of the cargo.

Much reliance was placed by the plaintiffs on the language of the learned judges in that case. Thus Wills, J., says: "Improper navigation is not confined to the voyage; it embraces acts done anterior to the voyage which render the ship unfit to carry the cargo." (2) Fry, L.J., says: "Without attempting to define all the cases which may come within the words 'improper navigation,' I think those words as used in this rule do include every case where something is omitted to be done which ought to be done before the departure of the ship in order to enable the ship to carry the cargo safely from the port of departure to the port of arrival, and where that omission leads to the cargo not being safely and properly so carried." (3) And Lopes, L.J., says: "In my opinion, improper navigation means the improper management of a ship in respect of the cargo (and this was a cargo-carrying ship) during the voyage . . . . It appears to me that any negligence before the commencement of the voyage which results in bad management of the ship in respect of the cargo during the voyage is improper navigation within this rule, although the course of the vessel is in no way impeded or hindered." These observations, however, must I think be construed with regard to the facts of the case and the arguments presented, and not as laying down as a rule that all improper management of whatever kind of a ship whereby a cargo is damaged is necessarily "improper navigation" with reference to that cargo.

The illustrations given by Fry, L.J., of a captain having put to sea without a compass whereby the ship loses her way on the ocean and ship and cargo are lost, or again of bad stowage before the commencement of the voyage affecting the sailing

(1) 19 Q. B. D. 242.

(2) At p. 242.

(3) At p. 249.

of the ship, point to some limitation imposed by the use of the word "navigation," and on reference to the judgment of Lord Esher, M.R., I think it clear what the limitation is. "Improper navigation" includes, according to him, something wrongly done or omitted before the navigation commenced which has an effect on the ship's navigation while she is being navigated, which affects her safe sailing as a ship with regard to the safety of the goods on board. In *Carmichael's Case* (1) the safe sailing of the ship was directly affected as regarded the safety of the goods owing to the inefficient closing of the porthole before the navigation began. The partly-closed opening rendered her unsafe as a ship for the cargo just as she would have been unsafe had she gone to sea with her hatches open so that sea-water could reach her hold. That being so, the defendants' pleas, first, that the wrong act was done before the navigation commenced; and, secondly, that the ship herself had not been endangered, were held unavailing.

So, again, in *The Warkworth* (2), the plaintiffs' ship, owing to a defect in her steering gear which had been carelessly mended before the navigation commenced, steered so badly that she came into collision with another vessel. It was held that she had been "improperly navigated" within the meaning of 25 & 26 Vict. c. 63, s. 54, sub-s. 4. She had been sent to sea in a state which rendered it dangerous to sail her, and it is with reference to the fact that she was not in a condition to be employed as a ship at all that the observation of Bowen, L.J., must, I think, be read. "A person," he says, "who uses his ship which is not in a condition to be so employed, does in reality improperly navigate her." (3) By that I understand him to refer to the employment of a ship as a ship.

Now, in the present case the act of improper navigation relied on was putting the cargo into a hold the bottom of which was so saturated with a tarry substance that the whole cargo was tainted. But this act had no effect whatever on the safe sailing of the ship as a ship with regard to the safety of the goods. It was bad management of her as a receptacle or warehouse for the goods,

(1) 19 Q. B. D. 242. (2) 9 P. D. 145.

(3) At p. 148.

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but did not at all affect her qualities as a ship, and that being so does not appear to me to come within the term "improper navigation."

This disposes of the case, but I think I ought to express my opinion on the further contention raised by the defendants. Assuming the case to be one of "improper navigation," was it one of "improper stowage?" I have felt considerable doubt on this point. But after consideration I have come to the conclusion that the case was one of "improper stowage." It was urged that improper stowage meant improper collocation of the parts of the cargo. But I do not see why the term is to be so limited. It seems to me to apply as well as to the placing of the whole cargo in an unsuitable place as to the unskiiful disposition of its parts. Suppose, for example, that the cargo had been tainted by the dunnage, I should certainly have thought the case to be one of improper stowage, and I see no reason why the disposition of the cargo in a dirty and unsuitable hold is not equally improper stowage. Whichever view, therefore, be adopted as to the meaning of the phrase "improper navigation," the defendants are, in my judgment, protected from liability. If the case was not one of "improper navigation," they are free, because the first rule which I have cited does not apply. If the case is one of improper navigation, they are protected by the second rule which exempts them from liability in case of "improper stowage."

My judgment is accordingly for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Rowcliffes, Rawle, & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for defendants: W. *A. Crump & Son.*

H. D. W.

[IN THE COURT OF APPEAL.]

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April 12.

IN RE WENDT. EX PARTE OFFICIAL RECEIVER.

Bankruptcy—Service out of Jurisdiction—Receiving Order—Order to attend Public Examination—Jurisdiction—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 127—*Bankruptcy Rules*, 1886, *rr.* 141, 156, 179, 184–186.

The Court of Bankruptcy has no power to allow service out of the jurisdiction of a receiving order or an order that a bankrupt do attend the court for his public examination.

APPEAL *ex parte* by the official receiver against the refusal of an application for leave to serve on the bankrupt out of the jurisdiction the receiving order and an order for his attendance for the purpose of his public examination.

The bankruptcy petition alleged as an act of bankruptcy that the debtor had departed out of England with intent to defeat or delay his creditors, and substituted service was effected under rule 154. A receiving order was made, and notice of this order, and of another order fixing the public examination of the debtor, was duly advertised, as provided by sect. 13 of the Bankruptcy Act, 1883. Neither of these orders was served on the bankrupt personally, but they were both, under sect. 142 and rule 92, served by means of notices sent by post to his last known address. No statement of the debtor's affairs was made, and he was, on the application of the official receiver, adjudged a bankrupt under sect. 16. On the day appointed for his public examination the debtor did not attend, and the examination was adjourned sine die.

The official receiver, having discovered that the bankrupt was residing at Antwerp, applied to the Court to appoint a day to proceed with the adjourned public examination, and for leave to serve the debtor at Antwerp, or elsewhere in Belgium, with the receiving order and the order to attend the court for his public examination.

The registrar refused to give leave to serve the two orders out of the jurisdiction, because there was no express provision in the Act or the Rules enabling him to do so, similar to that which

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applies to petitions and bankruptcy notices, and because the sole object was to assert a present jurisdiction over the bankrupt to compel him to submit to the process of the Court.

The official receiver appealed.

Muir Mackenzie, for the official receiver. The question is, whether the registrar had jurisdiction to make the order asked for. If the order is made, and the bankrupt afterwards comes within the jurisdiction, he can at once be arrested on a warrant, whereas, if it were necessary first to serve him with notice, he would have an opportunity of going away again. The question depends upon the provisions of the Bankruptcy Rules, 1886, which were made under the authority conferred by sect. 127 (1) of the Bankruptcy Act, 1869.

(1) Sect. 127. "(1) The Lord Chancellor may from time to time, with the concurrence of the President of the Board of Trade, make, revoke, and alter general rules for carrying into effect the objects of this Act.

"(2.) All general rules made under the foregoing provisions of this section shall be laid before Parliament within three weeks after they are made if Parliament is then sitting, and if Parliament is not then sitting, within three weeks after the beginning of the then next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act.

"(3.) Such general rules as may be required for the purposes of this Act may be made at any time after the passing of this Act.

"(4.) Provided always, that the said general rules, so made, revoked, or altered, shall not extend the jurisdiction of the Court."

By rule 141 of the Bankruptcy Rules, 1886, "A bankruptcy notice shall be served, and service thereof shall be proved in the like manner as is by these rules prescribed for the service of a creditor's petition."

Rule 156: "Where a debtor petitioned against is not in England, the Court may order service to be made [of a creditor's petition] within such time and in such manner and form as it shall think fit.

Rule 179: "The official receiver shall cause a copy of the receiving-order, sealed with the seal of the Court, to be served on the debtor."

Rule 184: "When a receiving-order has been made against a debtor, it shall be the duty of the official receiver to make an application to the Court to appoint a day and hour for holding the public examination of the debtor, and, upon such application being made, the Court shall, by an order, appoint the day and hour for such public examination, and shall order the debtor to attend the court upon such day and at such hour."

Rule 185: "If the debtor fails to attend the public examination at the time and place appointed by any order for holding or proceeding with the same, and no good cause is shewn by him for such failure, it shall be lawful for the Court, upon its being proved to the satisfaction of the Court that the order requiring the debtor to

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The Rules do not contain any express provision for the service of such orders out of the jurisdiction, though they do expressly provide for service out of the jurisdiction in other cases, but such a power must be implied in this case.

[He referred to *In re Anglo-African Steamship Co.* (1); *In re Busfield.* (2)]

LORD ESHER, M.R. I think the general rule of construction is perfectly clear (assuming the Bankruptcy Rules to have the force of a statute) that, when the legislature have enacted that a thing is to be done by one of the Queen's Courts, the meaning is only that the Court may do that thing within the Queen's dominions, unless the legislature have expressly said that it may be done outside those dominions, in which case the Court has only to obey. In the present case there is no express provision that such orders may be served out of the jurisdiction, and therefore the general rule which I have stated applies.

FRY, L.J. The learned registrar has considered the case with great care, and he has, in my opinion, come to a correct conclusion.

LOPES, L.J., concurred.

Appeal dismissed.

Solicitors: *Lumley & Lumley.*

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attend the public examination was duly served, and without any further notice to the debtor, to issue a warrant for his arrest as provided by s. 25 (1) (*d*) of the Act, or to make such other order as the Court should think just."

Rule 186: "Where any order is made appointing the time and place for holding the public examination of a debtor, the official receiver shall serve a copy thereof on the debtor, and shall give to the creditors notice of such order, and of the time and place appointed thereby. The official receiver shall also send a notice of such order to such local paper as the Board of Trade may from time to time direct, or in default of such direction as he may think fit, and shall forward notice of such order to the Board of Trade to be gazetted."

(1) 32 Ch. D. 348.

(2) 32 Ch. D. 123.

W. L. C.

1889
April 30;
May 1.

CHISHOLM *v.* DOULTON.

Nuisance—Negligently using Furnace so as to emit Smoke—Criminal Liability of Master for Negligence of Servant—Smoke Nuisance (Metropolis) Act, 1853—16 *&* 17 *Vict. c.* 128, *ss.* 1, 2.

The defendant, who was the owner and occupier of certain premises in the metropolis used for the purpose of manufacture, was summoned under the Smoke Nuisance (Metropolis) Act, 1853, for negligently using a furnace in such premises so that the smoke arising therefrom was not effectually consumed. The furnace in question was constructed so as to consume its own smoke if carefully used; and the emission of smoke complained of was caused by the carelessness of the stoker employed by the defendant to attend to the furnace. The defendant was not personally guilty of any negligence in connection with the matter:—

Held, that the defendant was not criminally responsible for the negligence of his servant, and could not be convicted of the offence.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

The respondent, the owner and occupier of certain pottery works situate in the metropolis, was summoned by the appellant, one of the chief inspectors of the metropolitan police, for having on April 18, 1888, negligently used a furnace employed in his pottery works so that the smoke was not effectually consumed or burnt, contrary to the provisions of 16 & 17 Vict. c. 128, s. 1. (1)

(1) By the Smoke Nuisance (Metropolis) Act, 1853 (16 & 17 Vict. c. 128), s. 1, it is provided that "every furnace employed in any mill, factory, . . . or other buildings used for the purpose of trade or manufacture within the metropolis, . . . shall in all cases be constructed or altered so as to consume or burn the smoke arising from such furnace; and if any person shall . . . within the metropolis use any such furnace which shall not be constructed so as to consume or burn its own smoke, or shall so negligently use any such furnace as that the smoke arising therefrom shall not be effectually consumed or burnt, or shall carry on any trade or business which shall occasion any noxious or offensive effluvia, or otherwise annoy the neighbourhood or inhabitants, without using the best practicable means for preventing or counteracting such smoke or other annoyance, every person so offending, being the owner or occupier of the premises, or being a foreman or other person employed by such owner or occupier, shall, upon a summary conviction for such offence before any justice or justices, forfeit and pay a sum of not more than five pounds nor less than forty shillings, and upon a second conviction for such offence the sum of ten pounds, and for each sub-

The magistrate dismissed the summons subject to a case, of which the material facts were as follows: Smoke issued for the space of ten minutes on the morning of the day in question from one of the respondent's furnaces, but the furnace was properly constructed, and the smoke arose by the act of the stoker or person who lighted the fire, who might by proper care have prevented the occurrence. Neither the respondent nor his foreman were guilty of any negligence. The question for the opinion of the Court was whether the respondent was liable for the negligence of the stoker.

Scrutton, for the appellant. The object of the legislature was to stop the issuing of smoke from furnaces at all events; and the intention was to make the person who was the owner of the premises, and for whose benefit the furnace was used, responsible if any smoke was permitted to issue from it, whether such issuing of smoke was due to his own negligence or that of the persons employed by him. This is one of the class of cases in which the legislature has said that a person carrying on a business which is likely to be productive of damage to the public shall carry it on at his peril. In *Barnes* v. *Ackroyd* (1), a case under the Nuisances Removal Acts, it was held that the owner of a factory is responsible for the act of his servants in causing smoke to issue from the chimneys of the factory. Under the

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sequent conviction a sum double the amount of the penalty imposed for the last preceding conviction."

By s. 2: "Every steam engine and furnace used in the working of any steam vessel on the River Thames above London Bridge shall be constructed so as to consume the smoke arising from such engine and furnace; and if . . . any steam engine or furnace by which any steam vessel shall be worked while the same shall be above London Bridge shall not be constructed so as to consume or burn its own smoke, or such steam engine or furnace which shall be so constructed shall be wilfully or negligently used so that the smoke arising therefrom shall not be effectually consumed or burnt, the owner or master or other person having charge of such vessel shall, on a summary conviction for such offence before any justice or justices, forfeit and pay any sum not greater than five pounds nor less than forty shillings, and upon a second conviction for such offence a sum of ten pounds, and upon every other subsequent conviction for such offence a sum double the amount of the penalty imposed for the last preceding conviction."

(1) Law Rep. 7 Q. B. 474.

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Licensing Act, 1872, it has been held that an owner of licensed premises is liable to be convicted of supplying liquor to a constable on duty although the liquor was supplied by his servant without his authority: *Mullins* v. *Collins* (1). So if the servant of an hotel keeper being left in charge of the hotel suffers gaming upon the premises, his master is liable to a conviction: *Redgate* v. *Haynes* (2). A publican who sells liquor to a drunken person is guilty of an offence although, being ignorant of the person's condition, he had no intention to offend: *Cundy* v. *Le Cocq.* (3)

Channell, Q.C., (*G. M. Freeman*, with him), for the respondent. It is not denied that an Act of Parliament may make, and in fact in many cases has made, a master responsible criminally for the acts of his servant, but the question is whether this Act has done so in relation to this particular offence. No case has ever yet gone the length of deciding that, where the gist of an offence is negligence, a person can be convicted who was not in fact negligent. Here the offence charged is that of "negligently" using the furnace, and all personal negligence on the part of the respondent has been negatived. In s. 2 there are express words making the owner of a steamer on the river responsible for the negligence of his servant in causing smoke to issue from it, but there are no such express words to be found in s. 1.

Scrutton, in reply, referred to *Reg.* v. *Stephens* (4), where it was held that the owner of works carried on for his profit by his servants is liable to be indicted for a nuisance caused by his servants in carrying on those works, though done by them without his knowledge and contrary to his general orders.

FIELD, J. My mind has not been altogether free from doubt during the argument, but I think upon the whole that the true conclusion to arrive at upon the construction of the Act is that the respondent cannot be convicted upon the facts found by the magistrate. The offence of which it is sought to convict him is (to put it shortly) that of negligently using a furnace so as to emit black smoke, which is the thing that the legislature

(1) Law Rep. 9 Q. B. 292.
(2) 1 Q. B. D. 89.
(3) 13 Q. B. D. 207.
(4) Law Rep. 1 Q. B. 702.

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Field, J.

was desirous of preventing. The magistrate has found that the furnace was properly constructed, and that the respondent had gone to great expense in taking precautions against the discharge of smoke from his furnaces. He also found that the respondent had taken care to employ an efficient foreman to superintend the various persons having control of the furnaces. In short, the respondent was not personally guilty of any negligence whatever. The negligence which caused the emission of smoke on the particular morning in question was that of the stoker who lit the fire. And the question is, whether the respondent is criminally answerable for the negligence of his servant.

Now the general rule of law is that a person cannot be convicted and punished in a proceeding of a criminal nature unless it can be shewn that he had a guilty mind. And though the legislature undoubtedly may enact, as in the case of certain of the offences under this very Act it has enacted, that persons shall be criminally responsible for the doing of particular acts, even though they have no guilty mind in doing them, yet it is for the prosecution in each case to make out clearly that the legislature has in fact so enacted.

It is said that the respondent is liable because he in fact used this furnace for the purposes of his trade. I agree that he used it, for I entertain no doubt that if this were a civil proceeding for damages he would be liable, and yet he could in such proceeding only be liable if he were the person using it. But the mere use of a furnace so as to emit smoke is not an offence against the section, the offence is the using of it negligently. Suppose that by an accident which no care could have guarded against the furnace had got out of order, whereby an emission of smoke ensued, that could not be said to be an offence, for there would be no negligence. The essence of the offence is that it should be negligent. And here the respondent took all the care he could.

Looking at the cases in which it has been held that no appeal lies to the Court of Appeal from decisions relating to public nuisances, I am forced to the conclusion that this is not a mere civil proceeding, but that the offence charged against the respon-

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dent is a criminal offence. No doubt in the case of *Reg.* v. *Stephens* (1) the learned judges came to the conclusion that in that particular case the proceeding was civil. Whether they were right or wrong in that view it is not necessary for me to express any opinion, but they carefully guarded themselves against being supposed to infringe on the general rule of law that a master is not criminally responsible for the acts of his servants. That case must be taken to stand upon its own facts. The case here being a criminal one I must apply the general rule, and by that rule the respondent must be acquitted.

The conclusion that the respondent is not criminally liable for his servant's negligence is much fortified by a comparison of the provisions of s. 1 with those of s. 2. Sect. 1 applies to a stationary thing, a furnace fixed in a building, and provides that the person to be punished shall be the "person so offending," the person, that is to say, who negligently uses the furnace; whereas s. 2 applies to a thing which is transient, a steamer moving up or down the river, and provides that the person to be punished shall be not the "person so offending," but "the owner or master or other person having charge of such vessel." From a comparison of the language of those two sections it seems to me that in the one case the intention of the legislature was to strike at the person guilty of the negligence, while in the other, owing to the difficulty of finding out who that person was, it struck directly at the owner or person in charge. I quite admit that this construction may throw difficulties in the way of securing convictions under the former section, but I must construe the language as I find it.

I must also confess that the provision of s. 1 as to the increase of the penalties on repeated convictions raises a doubt in my mind as to the correctness of our construction. The penalty payable on the first conviction is one which, with the costs, there would be great difficulty in getting paid by a mere stoker; and on each subsequent conviction the penalty is to be doubled, so that if the stoker is the person responsible the penalty is to be recovered from a person who is utterly unable to pay it. This certainly does seem to suggest that the person responsible

(1) Law Rep. 1 Q. B. 702.

is the person to whom the premises belong, and who is capable of a series of offences, the opportunity of committing which a stoker would probably not be given.

But although I feel the difficulty I think it better to be bound by the general rule of law that a man cannot be convicted of a criminal offence unless he had a criminal mind. I am therefore of opinion that the magistrate was right, and that this appeal must be dismissed.

CAVE, J. I am of the same opinion. It is a general principle of our criminal law that there must be as an essential ingredient in a criminal offence some blameworthy condition of mind. Sometimes it is negligence, sometimes malice, sometimes guilty knowledge—but as a general rule there must be something of that kind which is designated by the expression mens rea. Moreover, it is a principle of our criminal law that the condition of mind of the servant is not to be imputed to the master. A master is not criminally responsible for a death caused by his servant's negligence, and still less for an offence depending on the servant's malice; nor can a master be held liable for the guilt of his servant in receiving goods knowing them to have been stolen. And this principle of the common law applies also to statutory offences with this difference, that it is in the power of the legislature, if it so pleases, to enact, and in some cases it has enacted, that a man may be convicted and punished for an offence although there was no blameworthy condition of mind about him; but, inasmuch as to do so is contrary to the general principle of the law, it lies on those who assert that the legislature has so enacted to make it out convincingly by the language of the statute; for we ought not lightly to presume that the legislature intended that A. should be punished for the fault of B.

Now apply those principles to the statute in question. Sect. 1 enacts that every furnace shall be "constructed or altered so as to consume or burn the smoke arising from such furnace." Then comes the part of the section which affixes penalties for various acts tending to produce the evil against which the legislation is directed. "If any person shall . . . use any such furnace which

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shall not be constructed so as to consume or burn its own smoke." Now there no condition of mind is required as an element in the offence; and we ought to hold with regard to that offence that the owner of the works, although not cognisant that his furnace is incapable of consuming its own smoke, is liable to be convicted if it in fact is so; for it is expressly enacted that if he uses a furnace not properly constructed he shall be liable to the penalty, and he certainly may use it by his servants. Then, passing over the middle clause for a moment, another part of the section enacts that if any person "shall carry on any trade or business which shall occasion any noxious or offensive effluvia, or otherwise annoy the neighbours or inhabitants, without using the best practicable means for preventing or counteracting such smoke or other annoyance," he shall be liable. There, again, a mens rea is not essential to the commission of the offence, the owner of the premises is absolutely liable if the trade is carried on in such a manner. Now go back to the clause under which the respondent has been summoned, "or shall so negligently use any such furnace as that the smoke arising therefrom shall not be effectually consumed." This differs from the other clauses in that it introduces the word "negligently," a word which imports a blameable condition of mind. If that word were not there, the owner would be responsible for the use of the furnace in such a way that the smoke was not consumed although the use was by his servants and not personally by himself. But the legislature has chosen to make negligence an essential ingredient in this particular offence. And, although the decisions under the Licensing Acts have established that, where a statute has expressly prohibited the doing of something without reference to the condition of mind of the party doing it, it may under certain circumstances, and having regard to the object of the statute, be reasonable to infer that the legislature intended that the master should be responsible if his servant disobeyed the prohibition, yet so far as I know no statute has ever yet been judicially interpreted as enacting that where negligence is an essential ingredient in the offence a master is to be responsible for the negligence of his servant.

Then is there anything else in the section which points to a

different interpretation of the clause which we have to construe. I think there is not. The section goes on—"Every person so offending, being the owner or occupier of the premises, or being a foreman or other person employed by such owner or occupier," shall be liable to the penalties provided. That no doubt clearly imports that under certain circumstances the owner or occupier may be guilty of some of the offences created by the section; but it creates no difficulty, for the words would be satisfied by reference to the first mentioned offence, that of using a furnace not properly constructed, which, as I have said, would clearly be an offence in the owner. And, further, the owner might be guilty of the offence of negligently using the furnace, provided there was personal negligence on his part, as, for instance, if he were to employ an incompetent person to attend to the furnace, or neglected to provide the person employed with the proper appliances to prevent smoke arising, or if he continued to retain in his employment a person who, by allowing smoke to be emitted, shewed that he was unfit to have the control of the furnace. On the other hand the words above referred to equally clearly import that under certain circumstances the person employed by the owner may be guilty of some of the offences created by the section and liable to the penalties thereto attached. And this, to my mind, at once disposes of the difficulty suggested with regard to the magnitude of the penalties, which it was said a stoker would be unable to pay, and which it was said consequently pointed to the owner as the sole person who was intended to be held responsible.

I should be quite content to rest my judgment on a consideration of the language of the 1st section alone. But the case for the respondent is still stronger when we come to look at the language of the 2nd section. The language under that section is very different. The legislature has there clearly expressed its intention that in the event of the stoker on board a steamer being guilty of negligence in the use of the furnace, the owner or person in charge of the vessel should be responsible. But the fact that the legislature where it intended that the master should be responsible for the negligence of the servant has expressed that intention in plain language, affords a strong

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reason why we should not infer such an intention where it has not expressed it clearly.

For these reasons I think that the decision of the magistrate must be affirmed.

Appeal dismissed.

Solicitors for appellant: *Wontner & Sons.*

Solicitors for respondent: *Vandercom & Co.*

J. F. C.

May 2.

[IN THE COURT OF APPEAL.]

NUTTON *v.* WILSON.

Local Government Acts—Local Board, Member of—Disqualification—"Concerned in a contract" with the Local Board—Work done by Member of Board for Contractor—Penalty—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *Sched. II., rr.* 64, 70.

By the Public Health Act, 1875, Schedule II., r. 64, a member of a local board who is in any manner concerned in any bargain or contract entered into by such board shall (except in certain cases) cease to be such member, and his office as such shall thereupon become vacant; and by rule 70 of the same schedule a penalty is imposed on a person who acts as such member when disabled from acting by any provision of the Act. The defendant, a member of a local board, was employed by persons, with whom the board had contracted for the performance of certain works on the premises of the board, to do portions of the works so contracted for:—

Held, that the defendant had been concerned in contracts entered into by the board within the meaning of the Act, and was therefore disqualified; and that, having acted as a member of such board since becoming so disqualified, he had incurred the penalty imposed by the Act.

APPEAL from the judgment of A. L. Smith, J., at the trial without a jury at Leeds Assizes.

The action was for a penalty of 50*l.* alleged to have been incurred by the defendant under the Public Health Act, 1875, Schedule II., r. 70, by acting as a member of a local board after having become disqualified by reason of being concerned in contracts entered into by the board. The facts were as follows: The defendant was a member of the local board of Elland, near Halifax. The local board had entered into a contract with one Holdsworth, a plumber, for the putting up by him of certain warming apparatus at the board's offices. It being necessary for the performance of the work to take up some boards, and to trim

and lay them down again, and to do some other joinery work on the board's premises, Holdsworth ordered such work of the defendant, who was a joiner, through his foreman, and the work was accordingly done by the defendant's men. The price of such work appeared to have amounted to between 2*l.* and 3*l.* The board had also entered into a contract with one Brook for the erection by him of a water-tank, with a meter-house attached, upon their premises. Brook employed the defendant to put up two door frames and a window frame, which formed part of the work contracted for, and had bought a beam of timber at defendant's place of business for the purposes of the work, the total price of the whole of the matters supplied by the defendant to Brook being 3*l.* 14*s.* The defendant had been paid those amounts by Holdsworth and Brook respectively. The evidence was not very direct as to the defendant's personal knowledge of the work done for Holdsworth, but it appeared that the invoice for such work was receipted by the defendant himself; and it appeared that he had himself taken the order for and superintended the work done for Brook. The defendant was not called at the trial. It was proved that the defendant had, as a member of the board, moved the acceptance by the board of Holdsworth's and Brook's tenders for the work contracted to be done by them respectively; but it appeared that they were not personally known to the defendant, and there had been nothing in the nature of collusion or previous arrangement between them and the defendant; and they stated that they only employed the defendant as they might have employed any ordinary tradesman, paying him the market price for the work done by him. The defendant had subsequently to the occurrences above mentioned continued to act as a member of the board. The learned judge found that the defendant, in moving the acceptance of Holdsworth's and Brook's tenders, did it without any previous knowledge of them, and in so doing had acted bonâ fide and honestly in the interests of the board; and he expressed himself of opinion that there had been no corrupt dealing on the part of the defendant, but he thought that the case of *Tomkins* v. *Jolliffe* (1) bound him to hold that under the circumstances above mentioned the defendant had been concerned

(1) 51 J. P. 247.

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in the contracts with Holdsworth and Brook, and therefore had incurred the penalty imposed by the statute. He therefore gave judgment for the plaintiff for 50*l.* (1)

E. Tindal Atkinson, Q.C., and *Cyril Dodd*, for the defendant. The defendant was not concerned in these contracts within the meaning of the statute. The term "concerned in" is a popular one, of no very definite meaning, and some reasonable limit must be applied to the interpretation of it. Its application must, it is contended, be limited to cases in which the member of the board has some interest in the contract itself. The mere fact that a member of the board is employed in the ordinary course of his business as a tradesman by a contractor with the board to do some part of the work at the ordinary trade price, or that he supplies in the ordinary way of business out of his shop at the market price some materials which happen to be used for the purposes of the work contracted for by the board, cannot per se cause him to be "concerned" in the contract within the meaning of the Act. If it were otherwise most absurd results would follow; if a paint-brush or a few nails were bought by the contractor in a shop belonging to a member of the board from his shopman, without his knowing anything about it, and without any intention on his part that they should be used for the purposes of a contract with the board, he would be disqualified if they were afterwards so used. The facts clearly shew that the defendant had really in point of fact no interest in these contracts whatever. Orders were given to him in the ordinary course of business to do certain work at the market price, his payment for which did not depend on the performance of the contracts at all.

(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), Schedule II., r. 64, provides that "Any member who (inter alia) in any manner is concerned in any bargain or contract entered into by such board, or participates in the profit thereof, or of any work done under the authority of this Act in or for the district, shall (except in the cases next hereinafter provided) cease to be such member, and his office as such shall thereupon become vacant:" and rule 70 provides that a person, who, being disabled from acting by any provision of the Act, acts as such member, shall be liable to a penalty of 50*l.*, which may be recovered by any person with full costs of suit by action of debt.

[They cited *Towsey* v. *White* (1); *Le Feuvre* v. *Lankester* (2); *Woolley* v. *Kay* (3); *Nicholson* v. *Fields* (4); *Whiteley* v. *Barley* (5); *Burgess* v. *Clark* (6); *Todd* v. *Robinson* (7).]

Forbes, Q.C., and *Yarborough Anderson*, for the plaintiff. The defendant was concerned in these contracts within the meaning of the Act. In this case the defendant himself moved the acceptance of the tenders of both Holdsworth and Brook, and therefore knew of the contracts. The work was done on the board's premises; and in one case the defendant receipted the invoice, and in the other the order for the work was given to him. Moreover, the defendant was not called at the trial to prove that he was not cognizant that the work was being done under the contracts with the board. Therefore it is not like the case suggested, where a tradesman or his shopman sells materials in the ordinary way of business to a contractor, in ignorance of the purpose to which are to be applied. [They were then stopped by the Court.]

LORD ESHER, M.R. I adhere to what I have before said with regard to provisions of this kind. They are intended to prevent the members of local boards, which may have occasion to enter into contracts, from being exposed to temptation, or even to the semblance of temptation. All we have now to decide is whether, where a member of a local board within this Act does part of the work which a contractor has entered into a contract with the board to do on their premises, he is within the meaning of the Act "in any manner concerned in that contract." This defendant did in the case of two contracts made by contractors with the board of which he was a member do part of the work contracted to be done. It seems to me that in both cases what he did amounted to a disqualification under the Act of Parliament, and that, having acted as a member while so disqualified, he has been guilty of a breach of the provisions of the Act, and must pay the penalty accordingly. I therefore think the appeal must

(1) 5 B. & C. 125.
(2) 3 E. & B. 530; 23 L. J. (Q.B.) 254.
(3) 1 H. & N. 307; 25 L. J. (Ex.) 351.
(4) 7 H. & N. 810; 31 L. J. (Ex.) 233.
(5) 21 Q. B. D. 154.
(6) 14 Q. B. D. 735.
(7) 14 Q. B. D. 739.

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be dismissed. I think, however, it is only right to say that we do not intend to suggest any corrupt intention on the defendant's part. He has made a mistake in law, and must suffer accordingly.

LINDLEY, L.J. The question in this case turns upon the true construction of the provision of Schedule II. of the Public Health Act, 1875, to which we have been referred. The language we have to interpret is this: the clause provides that any member, who "in any manner is concerned in any bargain or contract entered into by such board or participates in the profits thereof," shall cease to be a member. There does not seem to be any question here of participating in the profits of a contract; but the question is whether the defendant can be said to have been concerned in any bargain or contract entered into by the board. The expression "in any manner concerned" is a somewhat lax one. Cases may be put in which a person might perhaps be said in one sense to be concerned in a contract entered into by the board, and yet it might be tolerably obvious that he was not "concerned in the contract" in the sense in which the Act uses the words. To interpret words of this kind, which have no very definite meaning, and which perhaps were purposely employed for that very reason, we must look at the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise. In this case we find that the defendant, who was employed by the contractors to do part of the works which they had contracted with the board to do, himself moved the adoption of the tenders made by them for the performance of the work: and he might as a member of the board be one of the persons to pass the work when done. This seems to me precisely a case in which there might be such a conflict of interest and duty as the Act intended to prevent. I think it impossible to say that the defendant was not concerned in these contracts.

LOPES, J. I agree. With regard to the words in question, in my opinion, a person employed to do the work or a portion of the work, which another has entered into a contract with the board to do, is a person concerned in the contract. I therefore

come to the conclusion that the defendant is liable to the penalty sued for. It seems to me that, if we held the contrary, it would be letting in the very mischief the Act intended to prevent, and subjecting the members of local boards to the class of temptations which it was intended to remove. I express no opinion with regard to such very trifling matters as were suggested in the argument, e.g., the purchase of a paint-brush or a few nails from a member of the board. It may be that the maxim de minimis non curat lex would be applicable in such cases, but it is not necessary to consider that question here.

Appeal dismissed.

Solicitors for plaintiff: *J. H. Bridgford*, for *Lawton.*
Solicitors for defendant: *Williamson, Hill & Co.*

E. I.

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ARBITRATION—*Application for Leave to revoke Submission—Arbitrator making a Mistake of Law in a Matter within his Jurisdiction*—3 & 4 *Wm.* 4, *c.* 42, *s.* 39.] Where parties have agreed to refer questions in dispute between them to arbitration, the mere fact that the arbitrator in the course of the proceedings is making a mistake of law in a matter within his jurisdiction does not entitle the

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party dissatisfied with the arbitrator's view to come to the Court and claim as of right leave to revoke the submission.—Leave to revoke a submission on the ground of a mistake of law not amounting to an excess of jurisdiction will only be granted in very exceptional cases.—*East and West India Docks Co.* v. *Kirk & Randall* (12 App. Cas. 738) explained. JAMES *v.* JAMES AND BENDALL - - - - - - 669

—— Special Act—Power of arbitrator to state a special case under the Common Law Procedure Act, 1854 - - 504
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ARMY AND NAVY—Retired pay of officer—Sum paid to officer in respect of commutation of retired pay - - - 429
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ASSAULT—Criminal law — Assault occasioning actual bodily harm—Husband and wife—Communication of venereal disease 23
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ASSIGNMENT—Debt—Mayor's Court—Jurisdiction—"Cause of action arising wholly or in part within the city of London"
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—— Future payments under agreement for hire of chattels - - - - 193
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ATTACHMENT OF DEBTS—Garnishee order—Sufficiency of affidavit in support of application for - - - 249
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AVERAGE—"Free from average under three per cent. unless general"—General average and particular average not to be added together - - - - 580
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—— Income tax—Loan for less than a year—Payment of interest—Deduction of income tax - - - - 153
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BANKRUPTCY—*Bankruptcy Notice — Right to issue—Trustee in Bankruptcy of Judgment Creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).] The trustee in the bankruptcy of a judgment creditor is not entitled to issue a bankruptcy notice against the judgment debtor in respect of the judgment debt.—*Ex parte Blanchett* (17 Q. B. D. 303) followed.—*Ex parte Woodall* (13 Q. B. D. 479) distinguished. In re Goldring. Ex parte Harper - C. A. 87

2. —— *Composition — How far binding on Creditors — Future and contingent Liabilities— "Debts due and provable in bankruptcy"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 18, *sub-s.* 8.] By the Bankruptcy Act, 1883, s. 18. sub-s. 8, "a composition or scheme accepted and approved in pursuance of this section shall be binding on all the creditors, so far as relates to any debts due to them from the debtor and provable in bankruptcy":—*Held*, that the debts in respect of which a composition is binding under this section include all debts and liabilities which would be released by an order of discharge in bankruptcy. Flint *v.* Barnard - C. A. 90

3. —— *Petitioning Creditor's Debt—Judgment —Appeal pending from Judgment—Staying Proceedings on Bankruptcy Petition—Power of Court of Bankruptcy to inquire into Validity of Judgment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-ss.* 3, 4.] When in a bankruptcy petition the act of bankruptcy relied on is the failure to comply with a bankruptcy notice to pay a judgment debt, the mere fact that an appeal is pending from the judgment is not a sufficient ground for staying the proceedings upon the petition.—The Court of Bankruptcy will not, as a matter of course, inquire into the validity of a judgment debt, but only when there is evidence that the judgment has been obtained by fraud or collusion, or that there has been some miscarriage of justice. —*Ex parte Lennox* (16 Q. B. D. 315) explained. —*In re Saville* (4 Morrell, Bky. Cas. 277) approved and followed. In re Flatau. Ex parte Scotch Whisky Distillers - - C. A. 83

4. —— *Petitioning Creditor — Receiver appointed in Action in Chancery Division—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6.] In an action in the Chancery Division a receiver was appointed to collect and receive goods comprised in a charge given to the plaintiffs by one of the defendants, including therein any balance of the proceeds of the goods so charged in the hands of the other defendant. An order was subsequently made for the payment by the last-mentioned defendant to the receiver of a specific sum, being money received by him in respect of the proceeds of the goods, and comprised in the charge:—*Held*, that the receiver was not a "creditor" entitled to present a bankruptcy petition against such defendant within the meaning of s. 6 of the Bankruptcy Act, 1883.—*Ex parte Harris* (2 Ch. D. 423) explained and distinguished. In re Sacker. Ex parte Sacker - - - C. A. 179

5. —— *"Secured Creditor"—Judgment Creditor — Equitable Execution — Order appointing Receiver of Chattels — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 9, 45, 168.] A judgment creditor obtained an order appointing a receiver

BANKRUPTCY—*continued.*

"to receive the stock-in-trade and other property and effects belonging to" the judgment debtor, without prejudice to certain rights, all further questions being reserved until the further order of the Court. The receiver took possession of the goods under this order, and continued in possession of them until a receiving order in bankruptcy was made against the debtor. No part of the goods had been then sold. The debtor was afterwards adjudicated bankrupt:—*Held* (affirming the decision of Cave, J.), first, that the order appointing the receiver did not make the judgment creditor a "secured creditor" of the bankrupt within the meaning of s. 9 of the Bankruptcy Act, 1883; secondly, that, if it did, s. 45 applied, and the execution, not having been completed by sale before the date of the receiving order, could not prevail as against the title of the trustee in the bankruptcy. In re Dickinson. Ex parte Charrington & Co. - - - C. A. 187

6. —— *Order of Discharge, Suspension of— Conditional Order—Cumulative Penalties—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-s.* 2.] Upon the application of a bankrupt for an order of discharge the Court may, under s. 28, sub-s. 2, of the Bankruptcy Act, 1883, either suspend the operation of the order in point of time, or grant it subject to any of the conditions authorized by the section, but it has no power to make the order of discharge conditional and also to suspend its operation. In re Huggins. Ex parte Huggins - - - - - 277

7. —— *Title of Assignees in Irish Bankruptcy —Money paid to Bankrupt without Notice of Adjudication — Liability of innocent Agent — Irish Bankruptcy Act*, 1857 (20 & 21 *Vict. c.* 60), *s.* 267.] By s. 267 of the Irish Bankruptcy Act, 1857 (20 & 21 Vict. c. 60): "When any person shall be adjudged a bankrupt, all the personal estate and effects of such bankrupt, ... and all debts due or to be due to him, shall become absolutely vested in the assignees for the time being, for the benefit of the creditors of the bankrupt; . . . . and no such bankrupt, ... nor any person claiming through or under him, shall have power to recover the same, nor to make any release or discharge thereof, ... but such assignees shall have absolute power and remedy to recover the same in their own names."—The defendants, insurance brokers in London, effected for one Guy, a shipowner in Dublin, insurances upon the hull and chartered freight of one of his ships. The ship was subsequently lost. After the loss of the ship Guy was adjudicated bankrupt, and the plaintiffs, who were the official assignees of the Irish Bankruptcy Court, became the assignees of his estate. After the adjudication Guy instructed the defendants to collect from the insurance office, and to forward to him, the insurance moneys due upon the policies, which was done by the defendants in due course. The defendants had no notice that Guy had been adjudicated bankrupt. In an action by the plaintiffs, as assignees of Guy's estate, to recover the moneys so paid over by the defendants to Guy:—*Held*, that the title of the plaintiffs was complete upon the adjudication, and that they were entitled to recover. McEntire *v.* Potter & Co. - - - - - 438

BANKRUPTCY—*continued.*

8. —— *Disclaimer — Leasehold Property of Bankrupt — Disclaimer by Trustee — Application for Vesting Order — Persons to be served with Notice — Discretion of Court — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-s.* 6.] Upon an application under sub-s. 6 of s. 55 of the Bankruptcy Act, 1883, for a vesting order in relation to leasehold property of a bankrupt, which has been disclaimed by the trustee in the bankruptcy, the Court has a discretion to direct which of the persons entitled to apply for such an order shall be served with notice of the application, and, if in the opinion of the Court, the applicant has not served all the persons who ought to be served, he may be ordered to pay the costs occasioned by his default.—Until the point left undecided in *In re Finley* (21 Q. B. D. 475), as to the extent of the liability of a mortgagee by sub-demise from a bankrupt under an order vesting the original lease in him, shall have been decided, it will be proper to serve the lessor with notice of such an application. IN RE MORGAN. EX PARTE MORGAN [C. A. 592

9. —— *Receiving Order—Rescission—Jurisdiction—Discretion—Consent of Creditors—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 18, 23, 35, 104.] The Court has jurisdiction to rescind a receiving order, even though no scheme of arrangement or composition has been proposed by the debtor under the provisions of s. 18 of the Bankruptcy Act, 1883. But the exercise of the jurisdiction is a matter of discretion, and the order will not be rescinded as a matter of course because all the creditors consent to the rescission. The Court will consider all the circumstances of the case, the interests of the general body of creditors, and the interests of the public, and will be guided by the provisions of s. 35 as to the annulment of an adjudication of bankruptcy.—*Ex parte Carr* (35 W. R. 150) explained.—Decision of Divisional Court affirmed. IN RE HESTER. EX PARTE HESTER - - - C. A. 632

10. —— *Service out of Jurisdiction—Receiving Order — Order to attend Public Examination — Jurisdiction—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 127—*Bankruptcy Rules*, 1886, *rr.* 141, 156, 179, 184–186.] The Court of Bankruptcy has no power to allow service out of the jurisdiction of a receiving order or an order that a bankrupt do attend the court for his public examination. IN RE WENDT. EX PARTE OFFICIAL RECEIVER [C. A. 733

—— Assignment of future payments—Validity as against trustee in bankruptcy of assignor *See* BILL OF SALE. 2. [193

—— Deed of arrangement with creditors—Execution of deed by creditors after registration - - - - - 685
See DEED OF ARRANGEMENT WITH CREDITORS.

BILL OF EXCHANGE—*Estoppel—Negligence—Banker—Forgery of Name of Payee—Payee "a fictitious or non-existent person"—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 7, *sub-s.* 3.] In an action by the plaintiffs for a declaration that the defendants, their bankers, were not entitled to debit them with the amount of certain forged bills of exchange, it appeared that V., a foreign correspondent of the plaintiffs, being in the habit of drawing upon them, sometimes making the bills payable to the order of C. P. & Co., another foreign firm, a clerk in the plaintiffs' employment forged the signature of V. to bills purporting to be drawn on the plaintiffs by V. to the order of C. P. & Co., and resembling those which V. was in the habit of drawing on the plaintiffs, and placed among the plaintiffs' correspondence counterfeit letters of advice with respect to these bills resembling those ordinarily received from V. By these means the clerk procured the genuine acceptances of the plaintiffs to the bills which he had forged. He then forged upon the bills indorsements purporting to be those of C. P. & Co., the payees named therein, and was paid by the cashiers of the defendants across the counter the amounts for which the bills were drawn:—*Held*, by Charles, J., that the defendants were not protected by s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, as C. P. & Co. were not "fictitious or non-existing" payees within the meaning of the sub-section; that the plaintiffs had not been guilty of negligence immediately connected with the transactions so as to disentitle them to recover; and that the defendants were not entitled to debit the plaintiffs with the amount of the forged bills paid as above mentioned. VAGLIANO BROTHERS *v.* GOVERNOR AND COMPANY OF BANK OF ENGLAND - - 103

BILL OF SALE—*Consideration, Statement of—Money paid—Accruing Liability, Retention of Money to satisfy—Expenses—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.] The consideration for a bill of sale was stated to be the payment of a sum of money by the grantee to the grantor. Part only of such sum was in fact paid over, the remainder being retained by the grantee by agreement with the grantor in satisfaction of (1) the amounts of acceptances which had been given by the grantor to the grantee, and were then running; (2) a sum agreed to be paid by the grantor to the grantee for the hire of furniture assigned by the bill of sale for a period of three months; and (3) an agreed sum for expenses of the transaction:—*Held*, that none of the amounts so retained could truly be said to have been paid to the grantor, and therefore the consideration was not truly stated, and the bill of sale was void.—*Ex parte National Mercantile Bank* (15 Ch. D. 42) discussed. RICHARDSON *v.* HARRIS - C. A. 268

2. —— *Bill of Sale—Bankruptcy—"License to take possession of personal chattels as security for a debt"—Assignment of Rights under Agreement for Hire and Purchase of Furniture—Assignment of Future Payments—Validity as against Trustee in Bankruptcy of Assignor.*] An agreement for the hire, and ultimate purchase by the hirer, of specified articles of furniture, provided that, on payment by the hirer of an agreed price, which was to be paid in a fixed number of periodical instalments, the articles should become his property, but that, until the agreed price had been fully paid, they should remain the property of the lender. It was further provided that, if default should be made in the punctual payment of the hire, the lender might immediately enter

BILL OF SALE—*continued.*
upon the dwelling-house of the hirer and take possession of, and remove and sell the goods.—During the currency of this agreement the lender assigned all his right and interest under the agreement to a person who had lent him money, as security for the advance, authorizing him, if default should be made in repayment of the loan as agreed, to exercise all the powers contained in the hiring agreement, until the balance due to him should have been repaid:—*Held*, that this assignment was not a "bill of sale" within the meaning of s. 4 of the Bills of Sale Act, 1878:—*Held* also, that the licence to enter and take possession of the goods was not capable of being assigned.—*Brown* v. *Metropolitan Counties Life Assurance Society* (28 L.J. (Q. B.) 236) followed.—*Held* also, that the assignment of the instalments which accrued due under the hiring agreement after the commencement of the bankruptcy of the assignor was valid as against the trustee in the bankruptcy.—*Ex parte Nichols* (22 Ch. D. 782) distinguished. IN RE DAVIS & CO.—EX PARTE RAWLINGS - - - - C. A. 193

BOND—*Release—Accord and Satisfaction to one of two Obligees—Specialty Debt—Practice—Pleading.*] To an action by two obligees of a common money bond the defendant pleaded accord and satisfaction by delivery of stock and goods to one of the plaintiffs. Upon an application to strike out the defence as being no answer to the action:—*Held*, that according to the rule in equity, which is now to prevail, accord and satisfaction must be taken to be an answer to an action for a specialty debt, but that according to equity joint creditors must primâ facie be taken to be interested as tenants in common, and not as joint tenants, and that the defence was good only as concerned the claim of the plaintiff who was party to the accord and satisfaction, and was therefore defective, and should be amended. STEEDS *v.* STEEDS - 537

—— Breach of condition—Discharge of surety
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BRICK EARTH—Reservation of mines and minerals - - - - 555
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BUILDING SOCIETY—*Mortgage—Redemption—Advanced Member—Proviso for Redemption on Payment according to Rules "for time being" of Society—Alteration of Rules after Date of Mortgage—Certificate of Registrar—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 18, 20, 21.] An "advanced" or borrowing member of a building society executed a mortgage to the society to secure an advance made by them to him. The mortgage contained a covenant by the mortgagor to pay to the society all subscriptions, fines, and other moneys which, according to the rules for the time being of the society, should from time to time become due and payable by him in respect of the security or the shares by virtue of which the advance was made to him. The proviso for redemption was expressed in similar terms. The

BUILDING SOCIETY—*continued.*
rules in force at the date of the mortgage did not render advanced members liable to contribute to the losses of the society. The rules were afterwards altered by the introduction of a provision that an advanced member should not be entitled to redeem his mortgage without paying, in addition to what would have been due from him under the original rules, his proportion of the losses of the society. The altered rules were certified by the registrar of building societies, as provided by the Building Societies Act, 1874:—*Held*, that the new rules applied to the mortgage, and that the plaintiff desiring to redeem his mortgage must do so in accordance with those rules.—*Smith's Case* (1 Ch. D. 481) distinguished.—*Held* also, that the registrar's certificate was conclusive as to the validity of the proceedings taken by the society for the passing of the new rules.—*Dewhurst* v. *Clarkson* (3 E. & B. 194) followed. ROSENBURG *v.* NORTHUMBERLAND BUILDING SOCIETY - - - - - C. A. 373

2. —— *Subscription Shares—Withdrawal—Winding-up—Liability of Withdrawn Members—*37 & 38 *Vict. c.* 42, *s.* 42, *s.* 14—25 & 26 *Vict. c.* 89, *s.* 200.] By the Building Societies Act, 1874 (37 & 38 Vict. c. 42), s. 14, the liability of any member of any society under the Act in respect of any shares upon which no advance has been made shall be limited to the amount actually paid or in arrear on such share.—By s. 16 the rules of every such society shall set forth "(4) the terms upon which shares may be withdrawn."—By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 200, "in the event of an unregistered company being wound up, every person shall be deemed to be a contributory who is liable at law or in equity to pay or contribute to the payment of any debt or liability of the company."—Members of a building society incorporated under the Building Societies Act, 1874, who had investing shares payable by monthly subscriptions, and upon which no advance had been made, gave due notice of withdrawal and received the estimated amount of their shares under the rules of the society before the shares were fully paid up or matured. The society was, within a year afterwards, wound up in the county court, under the winding-up clauses of the Companies Acts, and the judge, on the application of creditors, made an order declaring that holders of such shares not matured at the commencement of the winding-up were, notwithstanding withdrawal, liable to contribute to the assets of the society to the extent to which their shares were "in arrear" at the commencement of the winding-up, and that the extent to which such shares should be deemed to be in arrear was the extent of the total amount of subscriptions which became payable prior to the winding-up, together with fines and interest:—*Held*, that the order was wrong, for that, on withdrawal of their shares, the holders ceased to be members of the society, and no amount was "in arrear" within s. 14 of the Building Societies Act, 1874, and that they were not liable "at law or in equity" to contribute to its debts within the meaning of s. 200 of the Companies Act, 1862. IN RE THE SHEFFIELD AND SOUTH YORKSHIRE PERMANENT BUILDING SOCIETY - - - - 470

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—— *Brown* v. *Metropolitan Counties Life Assurance Society* (28 L. J. (Q. B.) 236) followed - - - - 193
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—— *Carr, Ex parte* (35 W. R. 150) explained
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—— *Childers* v. *Wooler* (2 E. & E. 287) considered - - - - 614
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—— *Cosgrave* v. *Trade Auxiliary Co.* (8 Ir. R. C. L. 349) considered - - 134
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—— *Dewhurst* v. *Clarkson* (3 E. & B. 194) followed - - - - 373
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—— *East and West India Docks Co.* v. *Kirk & Randall* (12 App. Cas. 738) explained
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—— *Harris, Ex parte* (2 Ch. D. 423) explained and distinguished - - - 179
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—— *Jarmain* v. *Hooper* (6 M. & G. 827) considered - - - - 614
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—— *Ocean Iron Steamship Insurance Association* v. *Leslie* (22 Q. B. D. 722) approved and followed - - - - 710
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—— *Reg.* v. *Bennett* (4 F. & F. 1105) considered
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—— *Sanger* v. *Sanger* (Law Rep. 11 Eq. 470) approved - - - - 548
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—— *Saville, In re* (4 Morrell Bky. Cas. 277) approved and followed - - 83
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—— *Smith's Case* (1 Ch. D. 481) distinguished
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—— *Spanish Telegraph Co.* v. *Shepherd* (13 Q. B. D. 202) discussed - - - 145
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COUNTY COUNCIL—*Election—Illegal Practice—Inadvertence—Relief from Penalty—Discretion of Court —Appeal to Court of Appeal—Criminal Matter—Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 75—*Municipal Elections* (*Corrupt and Illegal Practices*) *Act*, 1884 (47 *&* 48 *Vict. c.* 70), *ss.* 13, 17, 20—*Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 47.] The effect of s. 75 of the Local Government Act, 1888, is to incorporate into that Act ss. 13, 17, and 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884.—An appeal lies to the Court of Appeal against the refusal of a Divisional Court to make an order, under s. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, exempting a candidate at an election of county councillors from penalties incurred by him through inadvertence, under s. 17, by reason of practices which are declared to be illegal by s. 13, such a matter not being a criminal matter within the meaning of s. 47 of the Judicature Act, 1883.—On the occasion of the first election of county councillors under the Local Government Act, 1888, a candidate inadvertently incurred a penalty for an illegal practice, and a Divisional Court refused to grant him relief, on the ground that ignorance of the provisions of the Act was no excuse for a breach of them:—*Held*, that, having regard to the difficulty of construing s. 75 of the Local Government Act, 1888, and to the fact that

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another Divisional Court had granted relief to other candidates under precisely similar circumstances, the exercise of the discretion by the Divisional Court might (with their assent on being informed of the decisions of the other Court), be overruled, and the relief granted. Ex parte Walker - - - - - **C. A. 384**

COUNTY COURT—*Action for Sum not exceeding £100 commenced in High Court—Remitter to County Court for Trial — Jurisdiction — Retrospective Effect of Act—Action commenced before January* 1, 1889—*County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 65.] By s. 65 of the County Courts Act, 1888 (which came into operation on January 1, 1889), "where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed £100, ... it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried *in any court in which the action might have been commenced*, or in any court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly."—By s. 56, "All personal actions, where the debt, demand, or damage claimed is not more than £50, ... may be commenced in the court." By s. 186 the word "court" or "county court" "shall mean and include any court held under this Act, and also the City of London Court, and shall include and mean the judge or registrar of the court:"—*Held*, that s. 65 gives power to order the trial to take place in any county court in which the action (if the amount claimed had been such that it could have been commenced in a county court) might have been commenced:—*Held*, also, that s. 65 applies to actions commenced before January 1, 1889. Curtis *v.* Stovin - - - **C. A. 513**

2. —— *City of London Court—Jurisdiction—Hereditaments — Leasehold Property — County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 56.] By s. 56 of the County Courts Act, 1888, except as in this Act provided, the Court shall not have cognizance of any action "in which the title to any corporeal or incorporeal hereditament shall be in question;" and by s. 60 jurisdiction is given to try such actions where neither the value of the hereditaments in dispute, nor the rent thereof, shall exceed £50 by the year.—Where the defendant disputed the plaintiffs' title to houses held by them under leases for years, and exceeding the specified yearly value:—*Held*, that the title to "hereditaments" was in question within the meaning of s. 56, and therefore that the county court had no jurisdiction to try the action. Tomkins *v.* Jones - - **C. A. 599**

3. —— *Appeal—Proceedings in Interpleader—Right of Appeal where Damages claimed—County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 120, 157.] In an interpleader proceeding under s. 157 of the County Courts Act, 1888, the value of the goods claimed was less than £20, and the claimant claimed damages, exceeding £20, against the high bailiff and the execution creditor. At the hearing the judge gave judgment for £15 for the

COUNTY COURT—*continued.*
claimant against the execution creditor, and did not grant leave to appeal:—*Held*, that the execution creditor had no right of appeal under s. 120, which provides that there shall be no right to appeal in proceedings in interpleader, where the money claimed, or the value of the goods and chattels claimed, or of the proceeds thereof, does not exceed £20, unless the judge shall grant leave to appeal. LUMB *v.* TEAL & CO. - - 675

—— Appeal—Leave to appeal—Court of Appeal *See* PRACTICE. 2. [343

COVENANT—To pay rent — Surrender by assignee of part of premises—Liability of lessee - - - - - 74
See LANDLORD AND TENANT. 2.

—— To pay rates, &c.—Water-rate - 145
See LANDLORD AND TENANT. 3.

CRIMINAL LAW—*Husband and Wife—Communication of Venereal Disease—Offences against the Person—Offences against Women—"Unlawfully and maliciously inflicting grievous bodily harm"—"Assault occasioning actual bodily harm"*—24 & 25 *Vict. c.* 100, *ss.* 20, 47.] The prisoner was convicted upon an indictment charging him with "unlawfully and maliciously inflicting grievous bodily harm" upon his wife, and with "an assault" upon her "occasioning actual bodily harm," under ss. 20 and 47 respectively of 24 & 25 Vict. c. 100. It appeared that at a time when the prisoner knew, but his wife did not know, that he was suffering from gonorrhœa, he had connection with her, that the result was that the disease was communicated to her, and that, had she been aware of his condition, she would not have submitted to the intercourse:—*Held*, by Lord Coleridge, C.J., Pollock and Huddleston, BB., Stephen, Manisty, Mathew, A. L. Smith, Wills, and Grantham, JJ. (Field, Hawkins, Day, and Charles, JJ., dissenting), that the conduct of the prisoner did not constitute an offence under either section of the statute, and that the conviction must be quashed.—*Reg.* v. *Bennett* (4 F. & F. 1105) and *Hegarty* v. *Shine* (14 Cox, C. C. 124, and C. A. 145) considered. THE QUEEN *v.* CLARENCE - - - - C. C. R. 23

2. —— *Libel—Letter written to Woman proposing Immoral Intercourse—Defamatory Libel tending to provoke Breach of the Peace.*] The defendant was tried and convicted on an indictment charging him with having unlawfully and maliciously written and published to a young woman of virtuous and modest character a defamatory letter of and concerning her, and of and concerning her character for virtue and modesty. The defendant having seen an advertisement for a situation inserted by the young woman in a newspaper, wrote, and sent to her at the address given, the letter in question, which contained a proposal in plain terms that she should surrender her chastity to him for a sum of money:—*Held*, that the conviction could be sustained, because, under all the circumstances, the defamatory letter might reasonably tend to provoke a breach of the peace. THE QUEEN *v.* ADAMS C. C. R. 66

CURATE—Allowance by Curates Augmentation Fund—Income tax - - 150
See REVENUE. 2.

DEBT—Assignment of—"Cause of action arising wholly or in part within the city of London"—Mayor's Court—Jurisdiction. *See* MAYOR'S COURT. 2. [128

—— Assignment — Assignment of future payments—Validity as against trustee in bankruptcy of assignor - - 193
See BILL OF SALE. 2.

DEED OF ARRANGEMENT WITH CREDITORS—*Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57), *ss.* 5, 6, 7, 12—*Registration—Execution of Deed by Creditors after Registration—Alteration of Deed—Bankruptcy—"Person aggrieved"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 104.] A deed of arrangement, whereby a debtor assigned all his property to a trustee for his creditors' benefit, made parties thereto of the 4th part, "the several persons, companies, and firms whose names and seals are hereunto signed and affixed respectively, being creditors of the debtor, and all other creditors of the debtor acceding hereto." The trust declared by the deed was to divide the balance of the proceeds of the estate after payment of expenses, &c., "rateably among the creditors parties hereto, including as such creditors, if the trustee and committee of inspection shall determine, but not otherwise, such persons being creditors of the debtor as may have refused or neglected to execute these presents." The deed was executed on the same day by the debtor, the trustee, and one creditor who signed and sealed in a schedule thereto; and within seven days was registered under the Deeds of Arrangement Act, 1887, which avoids such deeds unless registered in compliance with the Act. Subsequently to such registration six other creditors signed and affixed their seals in the schedule:—*Held* (reversing the decision of the Queen's Bench Division), that the execution of the deed by creditors after registration did not amount to an alteration of the deed so as to avoid it or vitiate the registration of it; and that the provisions of the Act were sufficiently complied with by the registration of the deed as it existed at the time of such registration. IN RE BATTEN. EX PARTE MILNE - - - C. A. 685

DEFAMATION—*Libel—Privilege—Innuendo—Inference of Defamatory Meaning—Publication in Trade Newspaper of Extracts from Register of County Judgments.*] The plaintiff, a hatter, brought an action against the defendants, the proprietors of the *Hatters' Gazette*, a newspaper having a circulation among the members of the trade, for libel. The alleged libel consisted of a statement which appeared in the number of the *Hatters' Gazette* for December 1, 1887, in a column headed "The Gazette," with sub-headings "Bills of Sale," "County Court Judgments" and "The Bankruptcy Acts," under the sub-heading "County Court Judgments," as follows: "W. S., L. House, L. Street (the plaintiff's name and address), 27*l.* 1*s.* 0*d.*, October 13, 1887": the innuendo being "meaning thereby that on December 1, 1887, there was an unsatisfied judgment against the plaintiff in a county court for 27*l.* 1*s.* 0*d.*, which had been obtained on October 13, 1887." A judgment for that amount had been at that date recovered against the plaintiff in a county

DEFAMATION—*continued.*
court, and had been registered in the register of county court judgments kept pursuant to s. 18 of the County Courts Act, 1852. Prior to December 1, 1887, the plaintiff had satisfied the judgment, but he had not obtained a certificate of satisfaction, and on December 1, 1887, the judgment continued on the register. The defendants had, without themselves searching the register, taken the particulars from another trade newspaper. The judge held that the words were capable of the alleged defamatory meaning, and left it to the jury to say whether they were libellous. The jury found a verdict for the plaintiff, with substantial damages:—*Held*, that the direction and the verdict were right.—*Fleming* v. *Newton* (1 H. L. C. 263), *McNally* v. *Oldham* (16 C. L. Ir. (N.S.) 298) and *Cosgrave* v. *Trade Auxiliary Co.* (8 Ir. R. C. L. 349) considered. Williams *v.* Smith - - - - - - 134

DISCHARGE, ORDER OF—Suspension—Conditional order—Cumulative penalties
See Bankruptcy. 6. [277

DISCLAIMER — Lease — Bankruptcy — Sublease by way of mortgage—Application for vesting order—Persons entitled to notice
See Bankruptcy. 8. [592

DISCOVERY—Penal action—Action for treble damages for pound breach - 425
See Practice. 11.

DISQUALIFICATION—Local board, members of —"Concerned in a contract" with the local board—Work done by member of board for contractor—Penalty - 744
See Local Government Acts. 2.

DOG—Keeping dog without licence—Previous conviction—Reduction of penalty 142
See Revenue.

DUTY—Association for trade or business—Exemptions - - - - 279
See Revenue. 4.

EASEMENT—*Right of Way—Grant of Way by general Words—"Ways now or heretofore held or enjoyed"—Way at Date of Grant physically incapable of use with principal Subject of Grant.*] In 1872 the owner of two adjoining pieces of land granted one to the plaintiff and the other to the defendant. The grant to the plaintiff contained the general words, "together with all ways, &c., easements, and appurtenances whatsoever to the said tenement and premises hereby granted, or any part thereof, now or heretofore held or enjoyed, or reputed or known as part or parcel thereof, or appurtenant thereto." Prior to 1852 the occupiers of the two tenements had used in common a formed private road, for the purpose of going to and from their respective tenements to the high road. There was access to the plaintiff's tenement from the high road without passing over the private road, but the only access to the defendant's tenement was by means of that road. In 1852, by the permission of the owner, the then occupier of the plaintiff's tenement built a wall which entirely separated his tenement from the private road, and from that time down to 1872, and afterwards, with one exception, down to the

EASEMENT—*continued.*
issue of the writ, the occupiers of the plaintiff's tenement made no use of the private road, but obtained access to the tenement directly from the high road:—*Held*, that under the circumstances the inference that the word "heretofore" in the grant to the plaintiff was used in its ordinary grammatical meaning was rebutted, and that no right to the use of the private road passed to him. Roe *v.* Siddons - - - C. A. 224

ECCLESIASTICAL LAW—*District—New Parish—Burial—"Ecclesiastical Purposes"—Right of Inhabitant of New Parish to bury in the Old Parish—6 & 7 Vict. c. 37, ss. 11–15—19 & 20 Vict. c. 104, ss. 11, 14, 15.*] The burial of the dead is an "ecclesiastical purpose" within the meaning of 19 & 20 Vict. c. 104, s. 14, and where a district, which has a burial ground, becomes by the operation of this section a separate and distinct parish for ecclesiastical purposes, the inhabitants of such new parish cease to have any right of burial in the burial ground of the old parish out of which the district was taken. Hughes *v.* Lloyd 157

ELECTION—County council—Illegal practice—Inadvertence—Relief from penalty 384
See County Council.

—— Poor law—Assistant overseer — Power of justices to review election - 96
See Poor Law. 2.

ESTOPPEL—Negligence—Banker — Forged bill of exchange - - - - 103
See Bill of Exchange.

EVIDENCE—Production of documents — Documents in the hands of persons not parties to action - - - - 262
See Practice. 13.

—— Highway—Nuisance - - - 391
See Nuisance.

EXCEPTION—Mines and minerals—Brick earth and clay - - - - 555
See Mines and Minerals.

EXCISE — Appeal from conviction — Notice of appeal - - - - 628
See Justices. 3.

—— Revenue—Keeping dog without licence—Previous conviction—Reduction of penalty - - - - - 142
See Revenue.

EXECUTION—*Sheriff—Indorsement on Writ of Fi. Fa.—Direction to Sheriff to levy on particular Goods—Liability of Execution Creditor for wrongful Seizure by Sheriff.*] The defendant having recovered judgment in an action against one G. M. M., his solicitor indorsed on a writ of fieri facias, directing the sheriff to levy the amount of the judgment upon the goods of G. M. M., a statement that the execution debtor resided at a certain address, which, however, was not the address of such execution debtor, but that of his father, G. M. The sheriff seized the goods of G. M. the father. In an action brought by G. M. against the defendant, the execution creditor, in respect of such seizure, the jury found that the sheriff seized the goods of the plaintiff instead of those of G. M. M. the son, because he was misled by the direction he received from the solicitor of the defendant:—

EXECUTION—*continued.*
Held, that, upon such finding, the defendant was liable in respect of the wrongful seizure of the goods.—*Jarmain* v. *Hooper* (6 M. & G. 827) and *Childers* v. *Wooler* (2 E. & E. 287) considered, MORRIS *v.* SALBERG - - - C. A. 614

—— Receiver—Appointment of—Equitable execution - - - - 173
See PRACTICE. 6.

—— Receiver appointed in a claim in Chancery Division—Petitioning creditor—Bankruptcy - - - - 179
See BANKRUPTCY. 4.

—— Receiver—Retired pay of officer—Sum paid to officer in respect of commutation of retired pay - - - - 429
See PRACTICE. 7.

—— Seizure and sale—Secured creditor—Judgment creditor—Equitable execution 187
See BANKRUPTCY. 5.

FACILITIES—"Reasonable facilities"—Railway company—Excessive charges - 642
See RAILWAY COMPANY.

FISHERY ACTS—*Sea Fishery—Enforcement of Act—Offence against Act—Sea Fishery Officer—Exclusive Right to prosecute*—46 & 47 *Vict. c.* 22, *ss.* 4, 11—*First Schedule, Article* 22.] The Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), creates certain offences, and by s. 11: "The provisions of this Act . . . . shall be enforced by sea-fishery officers," who are defined by that section:—*Held*, that the effect of the above words is that no one except a sea-fishery officer can prosecute for an offence against the Act, and a rule calling upon justices to hear and determine a summons for an offence against the Act, taken out by a private individual, discharged. THE QUEEN *v.* CUBITT [622

FRAUDS, STATUTE OF—Factors Act, 1877—Vendee in possession of document of title - - - - - 364
See SALE OF GOODS,

—— Memorandum in writing—Memorandum after action - - - - 357
See SALE OF GOODS. 2.

GAMING—*Principal and Agent—Employment of Agent to bet on Account of Principal*—8 & 9 *Vict. c.* 109, *s.* 18.] The plaintiff having employed the defendant to bet on commission, and the defendant having failed to make certain bets pursuant to the plaintiff's instructions, the plaintiff sued the defendant for breach of contract as his agent, claiming as damages the excess of gains over losses which should have been received by the defendant, had the bets in question been made, after deducting the amount of his commission:—*Held*, that as by statute 8 & 9 Vict. c. 109, s. 18, the bets would not have been recoverable at law, the plaintiff could not maintain the action. COHEN *v.* KITTELL - - - - - 680

—— Game of skill played for money—Suffering gaming on licensed premises - 351
See INN. 3.

GARNISHEE ORDER—Sufficiency of affidavit in support of application - - 249
See PRACTICE. 8.

GRANT—Easement—Right of way—Grant of way by general words—Ways now or heretofore held or enjoyed - 224
See EASEMENT.

—— Reservation of mines and minerals—Brick earth and clay - - - 555
See MINES AND MINERALS.

HIGHWAY—Nuisance—Evidence - 391
See NUISANCE.

HUSBAND AND WIFE—*Married Woman—Debt incurred by Wife before Marriage—Judgment against Wife—Separate Estate—Restraint on Anticipation—Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93), *s.* 12.] Sect. 12 of the Married Women's Property Act, 1870, which makes any property belonging to a married woman for her separate use liable to satisfy her debts contracted before marriage, extends to property settled to the separate use of a married woman without power of anticipation.—A husband and wife were sued in respect of debts of the wife contracted before their marriage, which took place after the coming into operation of the Married Women's Property Act, 1870, and before the coming into operation of the Married Women's Property Act, 1882, and judgment was recovered against them. The wife was possessed of property which upon her marriage was settled to her separate use without power of anticipation:—*Held*, that the wife's property was liable to satisfy the judgment.—*Sanger* v. *Sanger* (Law Rep. 11 Eq. 470) approved. AXFORD *v.* REID [C. A. 548

—— Communication of venereal disease—Offences against the person - - - 23
See CRIMINAL LAW.

ILLEGITIMATE CHILD—Settlement—Poor-law
See POOR LAW. [164

INCOME TAX—Allowance—Charitable purposes
See REVENUE. 5. [296

—— Banker—Loan for less than a year—Payment of interest—Deduction of income tax - - - - - 153
See REVENUE. 3.

—— County asylum—Duty on income from land
See REVENUE. 7. [484

—— Curate—Allowance from Curates Augmentation Fund - - - - 150
See REVENUE. 2.

—— Life insurance company—Profits or gains—Interest arising from investments made for purposes of a business - 444
See REVENUE. 6.

INFANT—*Next Friend—Conduct of Cause—Compromise—Benefit of Infant.*] The plaintiff, an infant, brought an action by her next friend in the county court to recover damages for personal injuries sustained by her through the alleged negligence of the defendant. At the trial a judgment of nonsuit was pronounced, and it was suggested that if there was no appeal the defendant

INFANT—*continued.*
would not ask for costs. The plaintiff's counsel agreed to this, and the judgment was entered without costs. The plaintiff was without means. On an application on her behalf for a new trial:—*Held* (reversing the judgment of the Queen's Bench Division), that the agreement was of no benefit to the infant, and was not binding on her. Rhodes *v.* Swithenbank - - C. A. 577

INFORMATION—By whom—Fishery Acts—Sea fishery officer - - - 622
See Fishery Acts.

IMMORALITY—Letter containing immodest proposals—Libel - - - 66
See Criminal Law. 2.

INN—*Licence to sell excisable Liquors—Renewal—Discretion of Justices—Licensing Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 1—*Licensing Act*, 1872 (35 *& 36 Vict. c.* 94), *s.* 42—*Licensing Act*, 1874 (37 *& 38 Vict. c.* 49), *s.* 26.] The discretion of the justices as to granting or refusing a licence by way of renewal under the Licensing Act, 1828 (9 Geo. 4, c. 61), and the Licensing Acts, 1872 and 1874, in respect of excisable liquors to be drunk on the premises, is absolute, provided it be exercised judicially.—On an application to justices under the Licensing Act, 1828, s. 1, for the renewal of a licence to sell excisable liquors by retail to be drunk on the premises the justices refused to renew the licence on the grounds of the remoteness of the inn from police supervision, and the character and necessities of the neighbourhood. An appeal to quarter sessions was dismissed. On a case stated:—*Held* (by Lord Esher, M.R., Fry and Lopes, L.JJ., affirming the judgment of the Queen's Bench Division) that the discretion vested in the justices under the Licensing Act, 1828, s. 1, had not been affected by the Licensing Acts, 1872 and 1874, and that it was therefore competent to them to withhold the licence on the grounds stated. Sharpe *v.* Wakefield - - - - C. A. 239

2. —— *Licence—Off Spirit Licence—Discretion of Justices—Grounds of Refusal—Wine and Beerhouse Act*, 1869 (32 *& 33 Vict. c.* 27), *s.* 8—*Beer Dealers Retail Licences Act*, 1880 (43 *Vict. c.* 6), *s.* 1.] Sect. 8 of the Wine and Beerhouse Act, 1869, which enacts that certificates for off retail licences under that Act are only to be refused upon one of the four grounds therein specified, is repealed by s. 1 of the Beer Dealers Retail Licences Act, 1880, only so far as it relates to beer licences; and the discretion of licensing justices as to the granting of certificates for off retail wine or spirit licences is still subject to the limitations imposed by s. 8 of the Wine and Beerhouse Act, 1869. The Queen *v.* Scott - 481

3. —— *Offences—"Gaming"—Game of Skill played for Money—Suffering Gaming on Licensed Premises—Licensing Act*, 1872 (35 *& 36 Vict. c.* 94), *s.* 17.] The appellant, a licensed person, suffered a game of skill called "skittle pool" to be played for small stakes of money on a billiard table in the licensed premises:—*Held*, that he could properly be convicted of suffering gaming under the Licensing Act, 1872, s. 17, sub-s. 1. Dyson *v.* Mason - - - - - 351

INSURANCE—*Insurance against Accident—"Effects of injury caused by accident"—Power of Arbitrator to state a Special Case under the Common Law Procedure Act*, 1854, *s.* 5.] The assured under a policy granted by the defendant company against "death from the effects of injury caused by accident," fell and dislocated his shoulder. He was at once put to bed and died in less than a month from the date of the accident, having been all the time confined to his bedroom. In a case stated in a reference under the defendants' special Act the umpire found that the assured died from pneumonia caused by cold, but that he would not have died as and when he did had it not been for the accident, that as a consequence of the accident he suffered from pain and was rendered restless, unable to wear his clothing, weak, and unusually susceptible to cold, and that his catching cold and the fatal effects of the cold were both due to the condition of health to which he had been reduced by the accident:—*Held*, that the death of the assured was due to the "effects of injury caused by accident" within the meaning of the policy.—The defendants' special Act provided for the reference to arbitration of any question arising on any of their contracts of insurance, and that the "submission to any such arbitration" might be made a rule of Court:—*Held*, that the umpire in a reference under the Act had power to state a special case for the opinion of the Court under the Common Law Procedure Act, 1854, s. 5. Isitt *v.* Railway Passengers Assurance Company - - 504

INSURANCE (LIFE)—Income tax—Profits or gains—Interest arising from investments made for purposes of a business 444
See Revenue. 6.

INSURANCE (MARINE)—*Memorandum—Free from Average under three per cent. unless General—General Average and Particular Average not to be added together.*] Under the memorandum in a marine policy by which the subject-matter of insurance is warranted free from average under a certain amount per cent., unless general, or the ship be stranded, sunk, or burnt, a general average loss cannot be added to a particular average loss to make up a loss amounting to the specified percentage.—A ship was insured by a policy expressed to be against all losses which could not be recovered under an ordinary Lloyd's policy by reason of the insertion therein of the memorandum against average under three per cent., unless general, or the ship be stranded, sunk, or burnt. The ship while covered by the policy, through stress of weather, incurred a particular average loss; and further damage to her was incurred under such circumstances as to constitute a general average loss. The particular average loss did not amount to three per cent. of her value, but the general and particular average losses taken together did amount to such percentage:—*Held*, that the assured were entitled to recover the particular average loss under the policy. Price & Co. *v.* The A 1 Ships' Small Damage Insurance Association - - - C. A. 580

2. —— *Mutual Insurance Company—"Improper navigation"—"Improper stowage."*] By the rules of the defendants, a shipowners' mutual insurance association, the plaintiffs were entitled

INSURANCE (MARINE)—*continued.*
to protection in respect of "damage to goods on board when caused by the improper navigation" of their ship, but were not entitled to claim in respect of "damage caused by improper stowage." —A cargo of wheat while in the hold of the plaintiffs' ship was damaged, owing to a taint communicated to the wheat through the ceiling and limber boards of the vessel having been saturated with a composition which had leaked from the previous cargo. The ceiling and limber boards had not been properly cleaned before the wheat was stowed:—*Held*, by Charles, J., that the damage was not caused by "improper navigation:"—*Semble*, per Charles, J., that the damage was caused by "improper stowage.—*Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (19 Q. B. D. 242) and *The Warkworth* (9 P. D. 145) considered. CANADA SHIPPING COMPANY *v.* BRITISH SHIPOWNERS' MUTUAL PROTECTING ASSOCIATION - - 727

3. —— *Warranty — "Iron," "Steel."*] A policy of insurance on a ship contained a clause "Warranted no iron, or ore, or phosphate cargo, exceeding the net registered tonnage." In an action on the policy against the underwriters:—*Held*, by the Court of Appeal, affirming the judgment of Mathew, J., that the warranty was broken by shipping a quantity of steel in excess of the net registered tonnage. HART *v.* STANDARD MARINE INSURANCE COMPANY - C. A. 499

INSURANCE (MUTUAL)—*Mutual Marine Insurance Association—Policy effected by one of co-Owners of Ship as Agent for all—Contributions to Losses—Liability of other co-Owners.*] The plaintiffs were a mutual marine association, being registered under the Companies Act, 1862, as a company limited by guarantee. The defendants were some of the part owners of a steamship. Hornstedt, to whom the other shares of the ship belonged, was the managing owner, having authority to insure the ship in such an association as that of the plaintiffs, and he insured it with them by a policy for 1000*l.* Hornstedt traded as Hornstedt & Garthorne. The policy stated that Hornstedt & Garthorne, "as well in their own names as for and in the names of all and every person and persons to whom the same may appertain, in part or in all, subject to the provisions hereinafter contained," insured the ship in the sum of 1000*l.* for a year, the charges of the insurance to be borne by members of the association having ships entered in the association, in proportion to the sums assured therein, and the assurers thereby bound themselves to the assured for the true performance of the premises, the consideration due unto the assurers for the insurance being the contributions to be paid from time to time by the assured for losses and averages on other steamships mutually insured in the association, and other costs and charges of the association at the rates per cent. to be determined by the committee. And it was mutually agreed between the assured and assurers that all the rules of the association, whether set out in the policy or indorsed thereon or otherwise, should be as binding on the assured and assurers as if they had been inserted in the policy and had formed part thereof. The rules were indorsed on the policy. The memorandum

INSURANCE (MUTUAL)—*continued.*
of association of the association stated its objects to be "the insurance of steamships belonging to members of the association, or in which members of the association are interested, or have a share or shares." The articles of association provided that "every person shall be deemed to have agreed to become a member of the association who insures any ship, or share or shares in a ship, in pursuance of the regulations herein contained." The first rule was, "the members of this club shall mutually insure each other's steamships, or shares therein, in such manner and against such loss and damage as are hereinafter mentioned." Hornstedt having become bankrupt, an action was brought against the defendants, the other co-owners of the ship, to recover contributions according to the rules to losses in respect of other ships insured with the association during the currency of the policy:—*Held* (affirming the judgment of Day, J.), that the defendants were liable, for whether they had or had not become members of the association, they had by the policy expressly contracted with the association that they would be liable for contributions to losses in respect of other ships insured with the association in accordance with the rules, just as if they had been members, and that such a contract was within the authority of the managing owner, and within the powers of the association.—*United Kingdom Mutual Steamship Assurance Association* v. *Nevill* (19 Q. B. D. 110) distinguished.—*Ocean Iron Steamship Insurance Association* v. *Leslie* (22 Q. B. D. 722) approved and followed. GREAT BRITAIN 100 A 1 STEAMSHIP INSURANCE ASSOCIATION *v.* WYLLIE [C. A. 710

INTEREST—Income tax—Profits or gains—Interest arising from investments made for purposes of a business - - 444
See REVENUE. 6.

INTERPLEADER — County court — Appeal — Right of appeal where damages claimed
See COUNTY COURT. 3. [675

JOINT CREDITOR—Accord and satisfaction to one of two obligees—Presumption that creditors are interested as tenants in common and not as joint tenants - 537
See BOND.

JUDGMENT—Bankruptcy—Petitioning creditor's debt—Appeal pending from judgment
See BANKRUPTCY. 3. [83

—— Bankruptcy—Petitioner's debt—Trustee in bankruptcy of judgment creditor - 87
See BANKRUPTCY.

JURISDICTION—County court—Title to corporeal or incorporeal hereditament 599
See COUNTY COURT. 2.

—— Mayor's Court—"Carrying on business"—Solicitor's clerk - - - 1
See MAYOR'S COURT.

JUSTICES — *County Treasurer — Churchwardens and Overseers—Order to pay Expenses of Burial of Bodies cast on Shore from the Sea—Validity of Justices' Order—48 Geo. 3, c. 75.*] By 48 Geo, 3, c. 75, s. 1, the churchwardens and overseers of any parish in which any dead human body shall be found cast on shore by the sea are required to

JUSTICES—*continued.*
cause the same forthwith to be removed to some convenient place, and with all convenient speed to be decently interred in the burial-ground of such parish. By s. 5 the churchwardens shall pay all necessary and proper costs and expenses which shall be incurred in or about the execution of the Act; and by s. 6 any justice of the peace for the county or place in which such body shall have been so removed or buried may, by writing under his hand, order the county treasurer to pay to the churchwardens and overseers such sums of money for their costs and expenses in or about the execution of the Act (after the same shall have been duly verified on oath) as to the justice shall seem reasonable and necessary.—A justice's order, made under s. 6, after stating that he had inquired into and ascertained on oath the costs and expenses, amounting to 1*l.* 5*s.*, incurred by the churchwardens and overseers by reason of a dead human body having been found and brought on to the shore within their parish, directed the county treasurer to pay to them the said sum of 1*l.* 5*s.*, according to the 48 Geo. 3, c. 75:—*Held*, that the order was bad, because it did not shew that the expenses in question were proper and necessary expenses incurred in or about the execution of the Act, and therefore did not sufficiently state facts to shew, or from which it could be inferred, that the justice had jurisdiction to make it. THE QUEEN *v.* TREASURER OF COUNTY OF KENT 603

2. —— *Practice — Poor Law — Removal of Pauper — Appeal against Order of Removal — Notice of Appeal—Summary Jurisdiction Acts*, 1848, 1879, 1884 (11 & 12 *Vict. c.* 43, *s.* 35; 42 & 43 *Vict. c.* 49, *ss.* 31, 54; 47 & 48 *Vict. c.* 43, *s.* 6.] By 11 & 12 Vict. c. 43, s. 35, orders for the removal of paupers are excepted from the provisions of that Act, and therefore the seven days' notice of appeal prescribed by s. 31 of 42 & 43 Vict. c. 49 (which by s. 54 is to be construed as one with 11 & 12 Vict. c. 43, and by 47 & 48 Vict. c. 43, s. 6, is made applicable to appeals from convictions or orders made in pursuance of the Summary Jurisdiction Acts,) is not required on an appeal against an order of removal. THE QUEEN *v.* JUSTICES OF SOMERSETSHIRE 625

3. —— *Practice—Excise Law—Appeal from Conviction—Notice of Appeal—*7 & 8 *Geo.* 4, *c.* 53, *s.* 83—*Summary Jurisdiction Acts*, 1879 *and* 1884 (42 & 43 *Vict. c.* 49, *s.* 31; 47 & 48 *Vict. c.* 43, *s.* 6).] The Act of 1827 for consolidating and amending the excise laws (7 & 8 Geo. 4, c. 53), s. 83), required notice of appeal from a conviction under that Act to be given "at and immediately upon the giving of the judgment appealed against."—By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, persons authorized to appeal from a court of summary jurisdiction may appeal, subject to the condition of giving notice of appeal, if no time is prescribed, within seven days after the day of the decision.—By the Summary Jurisdiction Act, 1884 (48 & 49 Vict. c. 43), s. 6, a person authorized to appeal by any Act before the Summary Jurisdiction Act, 1879, from a conviction or order of a court of summary jurisdiction made in pursuance of the Summary Jurisdiction Acts, shall appeal subject to the conditions and regulations contained in the Act of 1879.—A person

JUSTICES—*continued.*
convicted of an offence against the excise laws gave notice of appeal four days after the decision:—*Held*, making absolute a rule for a mandamus to justices to hear the appeal, that the effect of the Summary Jurisdiction Acts was to repeal by implication the provision requiring notice of appeal at and immediately upon the giving of the judgment, and therefore no time was prescribed within the meaning of s. 31 of the Summary Jurisdiction Act, 1879, so that by that section the time was seven days, and the notice given was sufficient. THE QUEEN *v.* JUSTICES OF GLAMORGANSHIRE - - - - 628

—— Assistant overseers—Power to review election - - - - 96
See POOR LAW. 2.

LANDLORD AND TENANT—*Lease by Mortgagor in Possession—Rights of Mortgagee under Lease—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 10, 18.] Where a lease is made by a mortgagor in possession under the powers given by the Conveyancing and Law of Property Act, 1881, the mortgagee, on giving notice to the tenant and going into possession, is entitled by virtue of the Act to enforce the covenants and conditions in the lease in the same manner as if he had been a party to it, and such right cannot be affected by any collateral agreement between the lessor and the lessee. MUNICIPAL PERMANENT INVESTMENT BUILDING SOCIETY *v.* SMITH - - - - - C. A. 70

2. —— *Lease—Covenant by Lessee to pay Rent reserved — Assignment — Surrender of Part of Premises by Assignee—Effect of—Apportionment.*] The plaintiff demised premises to the defendant for a term of years by deed containing a covenant by the defendant for the payment of the rent reserved. The defendant assigned the term, and his assignee surrendered a portion of the premises to the plaintiff. In an action on the covenant the plaintiff claimed to recover the amount of the apportioned rent for the part of the premises not surrendered:—*Held*, that the liability of the defendant on the covenant was not extinguished by the surrender of part of the demised premises, but he still remained liable thereon, at any rate to the amount claimed.—*Quære*, whether he remained liable to the extent of the whole of the rent originally reserved. BAYNTON *v.* MORGAN [C. A. 74

3. —— *Covenant by Lessor to pay Rates, Taxes, and Impositions—Water-rate.*] By a covenant contained in a lease of a warehouse in the city of London the lessor covenanted with the lessees to pay all rates, taxes, and impositions whatsoever, whether parliamentary, parochial, or imposed by the corporation of the city of London or otherwise howsoever, which then were or thereafter might be rated, charged, or assessed on the said premises, or any part thereof, or on the said yearly rent, or on the landlord, owner, or tenants of the said premises in respect thereof.—Water having been supplied to the demised premises for domestic purposes by the New River Company under the provisions of the Waterworks Clauses Act, 1847, the lessees paid the water-rates due in respect of

LANDLORD AND TENANT—*continued.*
such supply, and sought to recover the same from the lessor:—*Held*, that such water-rates were not rates or impositions imposed on or in respect of the premises within the meaning of the covenant, and therefore the lessees were not entitled to recover the same from the lessor.—*Spanish Telegraph Co.* v. *Shepherd* (13 Q. B. D. 202) discussed. BADCOCK *v.* HUNT - - - C. A. 145

—— Bankruptcy — Disclaimer of lease by trustee—Sub-lease by way of mortgage —Application for vesting order—Persons entitled to notice - - 592
See BANKRUPTCY. 8.

—— Breach of covenant to repair—Composition — Bankruptcy — Future and contingent liabilities - - - 90
See BANKRUPTCY. 2.

LIBEL—Criminal law—Letter calculated to provoke breach of peace - - 66
See CRIMINAL LAW. 2.

—— Privilege—Innuendo—Inference of defamatory meaning - - - 134
See DEFAMATION.

LICENCE—Right to take possession of chattels as security for debt—Assignment - 193
See BILL OF SALE. 2.

LICENSING ACTS —*Selling Beer by retail without Licence—"Second Offence"—4 & 5 Wm. 4, c. 85, s. 17—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.] The manager of a club was duly convicted under s. 17 of 4 & 5 Wm. 4, c. 85, of selling beer by retail without having an excise retail licence. Subsequently he was convicted under s. 3 of the Licensing Act, 1872, of selling intoxicating liquor, to wit, beer, without a licence. Upon the hearing of the latter charge the magistrate treated it as a second offence, and imposed the full penalty of £100 authorized in the case of "the second offence" by s. 3, sub-s. 2, of the Licensing Act, 1872.—*Held*, that there could only be a conviction under s. 3 of the Licensing Act, 1872, for a second offence where the conviction for the first offence had been under the same statute, and that the second conviction was therefore bad. IN RE AUTHERS - - - - - 345

—— Licence to sell exciseable liquors — Renewal—Discretion of justices - 239
See INN.

—— "Gaming" — Game of skill played for money—Suffering gaming on licensed premises - - - - 351
See INN. 3.

—— Off spirit license—Discretion of justices —Grounds for refusal - - 481
See INN. 2.

LOCAL GOVERNMENT ACTS — *Nuisance from Sewage Works—Abatement—Order of Justices—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 27, 91 *to* 96.] The provisions of 38 & 39 Vict. c. 55 (the Public Health Act, 1875), ss. 91 to 96, for the abatement of certain nuisances, do not apply to a nuisance arising from sewage tanks and works constructed under s. 27 by a local board of health, and a court of summary jurisdiction has, therefore, no power, on proof of a

LOCAL GOVERNMENT ACTS—*continued.*
nuisance so caused, to make an order for the abatement of such nuisance under s. 96. THE QUEEN *v.* PARLBY - - - - 520

2. —— *Local Board, Member of—Disqualification—"Concerned in a contract" with the Local Board—Work done by Member of Board for Contractor—Penalty—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *Sched. II., rr.* 64, 70.] By the Public Health Act, 1875, Schedule II., r. 64, a member of a local board who is in any manner concerned in any bargain or contract entered into by such board shall (except in certain cases) cease to be such member, and his office as such shall thereupon become vacant; and by rule 70 of the same schedule a penalty is imposed on a person who acts as such member when disabled from acting by any provision of the Act. The defendant, a member of a local board, was employed by persons, with whom the board had contracted for the performance of certain works on the premises of the board, to do portions of the works so contracted for:—*Held*, that the defendant had been concerned in contracts entered into by the board within the meaning of the Act, and was therefore disqualified; and that, having acted as a member of such board since becoming so disqualified, he had incurred the penalty imposed by the Act. NUTTON *v.* WILSON - C. A. 744

—— Poor-rate—Rate collector—Bond for performance of duties—Breach of condition—Discharge of surety - - 394
See PRINCIPAL AND SURETY.

LODGER — Franchise — Notice of claim — Sufficiency of - - - - 208
See PARLIAMENT. 3.

LUNATIC—*Lunacy Regulation Act*, 1862 (25 & 26 *Vict. c.* 86), *s.* 11—*Costs—Charges of Witness engaged on behalf of alleged Lunatic at Inquiry under the Act—Action against Lunatic not taken away.*] Sect. 11 of the Lunacy Regulation Act, 1862, in substance provides that it shall be lawful for the Lord Chancellor to order the costs, charges, and expenses of and incidental to the presentation of a petition for a commission in the nature of a writ de lunatico inquirendo, or for any order of inquiry under the Lunacy Regulation Act, 1853, and to the prosecution of any inquiry on such commission or order, to be paid either by the party who has presented the petition, or by the party opposing it, or out of the estate of the alleged lunatic, or partly in one way and partly in another; and that such order shall have the effect of an order for the payment of money made by the Court of Chancery.—An inquiry having been ordered under the Lunacy Regulation Acts whether or not the defendant was of unsound mind, the plaintiff, a medical man, was employed by the defendant's solicitor to examine the defendant, for the purpose of giving evidence of his sanity at the inquiry. The plaintiff accordingly did so, and attended and gave evidence at the inquiry, but notwithstanding such evidence the defendant was found to be a lunatic. The plaintiff subsequently brought an action in the county court against the defendant for his charges in respect of the services so rendered by him, but was nonsuited on the ground that he could not

LUNATIC—*continued.*
recover such charges without an order under the above-mentioned section:—*Held*, that the section did not take away or affect the plaintiff's right of action, assuming the action to be in other respects maintainable, and therefore that the nonsuit was wrong and there must be a new trial. BROCKWELL *v.* BULLOCK - - - C. A. 567

—— Income tax—County asylum—Duty on income from land - - - 484
See REVENUE. 7.

MANDAMUS—*Prerogative Writ—Railway Company—Transfer of Shares—Refusal to register—Remedy by Action.*] A shareholder in a railway company made a real and absolute transfer of his shares for a nominal consideration to an insolvent person in order to avoid liability for future calls. The company refused to register the transfer. A rule nisi for a prerogative writ of mandamus to compel the company to register the transfer having been granted:—*Held*, that inasmuch as the prosecutor had another specific and sufficient remedy, viz., by action of mandamus, the prerogative writ ought not to issue, and the rule must be discharged. THE QUEEN *v.* LAMBOURN VALLEY RAILWAY COMPANY - - - - 463

MAYOR'S COURT—*Jurisdiction—Prohibition—Mayor's Court (Extension) Act*, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 12—*Construction of Words, "Carry on business."*] By s. 12 of the Mayor's Court (Extension) Act, 1857, "Where the debt or damage claimed in any action shall not exceed 50*l.* no plea to the jurisdiction shall be allowed, provided the defendant, or one of the defendants, shall dwell or carry on business within the city of London":—*Held* (affirming the decision of the Queen's Bench Division), that a clerk employed by a solicitor at his office, which was within the city of London, did not "carry on business" there within the meaning of s. 12, so as to give the Mayor's Court jurisdiction to try an action in which the clerk was defendant. GRAHAM *v.* LEWIS - - - - - C. A. 1

2. —— *Jurisdiction—Prohibition—"Cause of action arising wholly or in part within the City of London or the liberties thereof"—Assignment of Debt—Mayor's Court Procedure Act* (20 & 21 *Vict. c. clvii.*), *s.* 12—*Judicature Act*, 1873, *s.* 25, *sub-s.* 6.] The plaintiff brought an action in the Mayor's Court as assignee of a debt alleged to be due in respect of the price of goods sold and delivered to the defendant by the assignor. The sale and delivery had taken place without the city of London, but the debt had been assigned in writing to the plaintiff pursuant to s. 25, sub-s. 6, of the Judicature Act, 1873, within the city of London:—*Held*, that the assignment of the debt was part of the cause of action, and that the cause of action having arisen in part within the city of London there was no ground for a prohibition. READ *v.* BROWN - - C. A. 128

METROPOLIS MANAGEMENT ACTS—18 & 19 *Vict. c.* 120, *s.* 116—25 & 26 *Vict. c.* 102, *s.* 106—*Notice of Action—Metropolitan Vestry—Negligence.*] The plaintiff was a driver employed by contractors who had contracted with the defendants, a metropolitan vestry, to provide them with horses and drivers for their carts used in watering

METROPOLIS MANAGEMENT ACTS—*continued.*
the streets under the powers of 18 & 19 Vict. c. 120. The defendants negligently supplied a cart with a defective axle, and by reason thereof the plaintiff, whilst driving the cart for the purpose of watering the streets, was thrown off and injured:—*Held*, that the defendants were entitled to notice of action under 25 & 26 Vict. c. 102, s. 106, because the supply of the water-cart to the plaintiff for the purpose of watering the streets was a thing "done or intended to be done" under the powers of the vestry under the Act empowering them to water the streets. EDWARDS *v.* VESTRY OF ST. MARY, ISLINGTON - - C. A. 338

MINES AND MINERALS—*Reservation from Grant—Brick Earth and Clay—Destruction of Surface of Land.*] A conveyance in fee of land reserved "all mines of coal culm iron and all other mines and minerals whatsoever except stone quarries," with power to work the same, and to make roads, watercourses, and other works, through, over, or upon the land, for the purpose of raising and carrying away the coal, culm, iron, or other minerals, provided that the surface or soil of the land should not be disturbed without the previous consent in writing of the grantee, his heirs or assigns, except only for the making, constructing, repairing, and using one road only, and one watercourse only, for all or any of the purposes aforesaid, the grantor, his heirs or assigns, doing as little damage as might be to the surface of the lands, and making compensation for all such damage. The defendants obtained from the owners of the land the right to put down a sewer which passed through a bed of brick earth and clay. The plaintiff, as owner of the reserved minerals, claimed compensation for the damage he had sustained and might sustain by reason of the acts of the defendants, and obtained an award in his favour under the Public Health Act, 1875. In an action on the award:—*Held*, applying the rule of construction laid down in *Hext* v. *Gill* (Law Rep. 7 Ch. 699), that, there being nothing in the context to shew that the reservation should have a more limited meaning, it included brick earth and clay, which were substances which could be got from underneath the surface of the earth for the purpose of profit; that the plaintiff, therefore, was owner of the brick earth and clay, and was entitled to compensation. EARL OF JERSEY *v.* GUARDIANS OF POOR OF NEATH POOR LAW UNION - - - - C. A. 555

—— Inclosure Act—Separate ownership of surface and minerals—Compulsory purchase—Right to work minerals - 702
See WATERWORKS COMPANY. 2.

—— Separate ownership of surface and minerals—Compulsory purchase - - 318
See WATERWORKS COMPANY.

MORTGAGE—Lease by mortgagor in possession—Rights of mortgagee under lease—Collateral agreement - - 70
See LANDLORD AND TENANT.

NEW TRIAL—Compensation for land—Issue tried in High Court—Regulation of Railways Act, 1868 - - 435
See PRACTICE. 9.

NEXT FRIEND—Infant—Compromise—Conduct of case—Benefit of infant - - 577
See INFANT.

NOTICE—Appeal from decision of judge in chambers given in vacation - 16
See PRACTICE.

—— Bankruptcy—Disclaimer of lease—Application for vesting order—Persons entitled to notice - - - - 592
See BANKRUPTCY.

—— Change of solicitor—Cause set down for trial—Notice to the associate - 259
See PRACTICE. 15.

—— Of action—Metropolis Management Acts—Metropolitan vestry—Negligence 338
See METROPOLIS MANAGEMENT ACTS.

—— Of appeal—Poor law—Order of removal
See JUSTICES. 2. [625

NUISANCE—*Heap of Earth near Highway—Horse frightened—Evidence that other Horses had been frightened by the same Object—Admissibility.*] In an action for a nuisance it appeared that the plaintiff was driving at night in a cart drawn by a horse along a public highway, when the horse shied at a heap of earth and refuse placed by the defendants on their land adjoining the highway, and the cart was upset and the plaintiff injured. —Evidence was tendered by the plaintiff to prove that other horses had shied at the heap on the same day:—*Held*, that if the heap was of such a nature as to be dangerous by causing horses passing on the highway to shy, it was a public nuisance, and that the evidence shewed that the heap was likely to cause horses to shy, and was therefore admissible. BROWN *v.* EASTERN AND MIDLANDS RAILWAY COMPANY - - - C. A. 391

2. —— *Negligently using Furnace so as to emit Smoke—Criminal Liability of Master for Negligence of Servant—Smoke Nuisance (Metropolis) Act*, 1853—16 & 17 *Vict. c.* 128, *ss.* 1, 2.] The defendant, who was the owner and occupier of certain premises in the metropolis used for the purpose of manufacture, was summoned under the Smoke Nuisance (Metropolis) Act, 1853, for negligently using a furnace in such premises so that the smoke arising therefrom was not effectually consumed. The furnace in question was constructed so as to consume its own smoke if carefully used; and the emission of smoke complained of was caused by the carelessness of the stoker employed by the defendant to attend to the furnace. The defendant was not personally guilty of any negligence in connection with the matter:—*Held*, that the defendant was not criminally responsible for the negligence of his servant, and could not be convicted of the offence. CHISHOLM *v.* DOULTON - - - 736

—— Local Governments Acts—Nuisance from sewage works — Abatement — Order of justices - - - - 520
See LOCAL GOVERNMENT ACTS.

ORDER — Justices — Payment of expenses of burial of bodies cast ashore from the sea —Statement of facts shewing jurisdiction - - - - - 603
See JUSTICES.

ORDER—*continued.*

—— Justices—Statement of facts shewing jurisdiction - - - - 628
See JUSTICES. 3.

ORDER OF DISCHARGE—Suspension of—Bankruptcy—Conditional order—Cumulative penalties - - - - 277
See BANKRUPTCY. 6.

OWNER—Poor-rate—Small tenements—Deductions—Voids and losses of rent—Cost of collection - - - 211, 703
See POOR-RATE. 1, 2.

PARISH—Burial—Right of inhabitant of new parish to burial in old parish - 157
See ECCLESIASTICAL LAW.

PARLIAMENT—*Registration—Borough Vote—County Council—Notice of Objection—Power of Amendment—County Electors Act*, 1888 (51 *Vict. c.* 10), *s.* 4, *sub-s.* 1; *s.* 13—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 15, *sub-s.* 2; *s.* 28, *sub-s.* 2—*Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18, *Schedule III., Form I., No.* 2.] By Form I., No. 2, In Schedule III. to s. 18 of the Registration Act, 1885, where a list of voters is made out in divisions the notice of objection to be given to the person objected to shall specify the division to which the objection refers.—The occupiers' list of voters for a borough was made out in divisions, and the name of a person intended to be objected to was in Division One, which consisted of persons entitled to be registered both as parliamentary voters and as county electors. The notice of objection was as follows: "I hereby give you notice that I object to your name being retained on the occupiers' list of parliamentary voters for the borough of ———, and as a county elector for the county of ———":—*Held*, that assuming the notice to be invalid, the defect was a "mistake" which the revising barrister had power to correct by inserting "Division One" after "Occupiers' List." *Semble* (per Lord Coleridge, C.J., and Manisty and Hawkins, JJ.), that the notice was good without amendment. HARTLEY *v.* HALSE - - - - - 200

2. —— *Registration — Lodger Franchise — Claim to be placed on Old Lodger List—Declaration of Residence, Sufficiency of—Representation of People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 30, *sub-s.* 2—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *ss.* 22, 23—*Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18, *Sched.* 3, *Form H. No.* 2.] In a notice of claim delivered to overseers by a person claiming to be placed on the Old Lodger List, it appeared that the declaration of residence and the attestation were dated July 9, six days before July 15, the date of the expiration of the year of residence to which they referred:—*Held*, that the case was governed by *Hersant* v. *Halse* (18 Q. B. D. 412), that the claim was bad on the face of it, and that the claimant was not duly qualified. JONES *v.* KENT - - - - - - 204

3. —— *Registration — Lodger Franchise — Notice of Claim, Sufficiency of—Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *s.* 30, *sub-s.* 2—*Registration Act*, 1885 (48 *Vict. c.* 15), *s.* 18, *Sched.* 3, *Form H, No.* 2.] A notice of claim

PARLIAMENT—*continued.*
delivered by a lodger claimant differed from Form H, No. 2, in Sched. 3, to the Registration Act, 1885 (48 Vict. c. 15), in that it omitted the date of the attestation.—*Held*, on the authority of *Jones* v. *Kent* (Law Rep. 22 Q. B. D. 204), that the omission was material and that the claim was invalid. SMITH *v.* CHANDLER - - 208

PARTIES—Adding defendants—Right of third party to object - - - 657
See PRACTICE. 10.

PAYMENT—Money paid to bankrupt without notice of adjudication—Liability of innocent agent - - - - 438
See BANKRUPTCY. 7.

PENALTY—Disqualification—Local board, member of—Concerned in a contract with the local board—Work done by member of board for contractor - - 744
See LOCAL GOVERNMENT ACTS. 2.

—— Reduction to less than one-fourth of the amount—Previous conviction—Keeping dog without licence - - 142
See REVENUE.

—— Penal action—Discovery of documents—Action for treble damages for pound breach - - - - 425
See PRACTICE. 11.

PENSION—Retired pay of officer—Sum paid to officer in respect of commutation of retired pay—Execution - - 429
See PRACTICE. 7.

PLEADING—Delivery of counter-claim—Reply
See PRACTICE. 16. [265

—— Joint defendants in action of tort—Defendant severing in his pleading—Cost of separate pleading - - 99, 529
See PRACTICE. 4, 5.

POOR LAW—*Derivative Settlement—Settlement of Illegitimate Child—4 & 5 Wm. 4, c. 76, s. 71—39 & 40 Vict. c. 61, s. 35.*] Under the Divided Parishes Act (39 & 40 Vict. c. 61), s. 35, an illegitimate child under sixteen, born after the passing of that Act, whose mother has since its birth acquired a derivative settlement, does not take the settlement which its mother had at the time of its birth, but is to be deemed to be settled in the place where it was born. GUARDIANS OF NORTHWICH UNION *v.* GUARDIANS OF ST. PANCRAS UNION - - - - - C. A. 164

2. —— *Election — Assistant-Overseer — Appointment by Justices—Power to review Election—58 Geo. 3, c. 69, ss. 1, 2, 3—59 Geo. 3, c. 12, s. 7.*] By 59 Geo, 3, c. 12, s. 7, it shall be lawful for the inhabitants of any parish in vestry assembled to nominate and elect any discreet person to be assistant-overseer of the poor . . . . and it shall be lawful for any two justices of the peace by warrant to appoint any person who shall be so nominated and elected to be assistant-overseer:—*Held*, that after a person has been in fact nominated and elected by the vestry as assistant-overseer, the justices must issue their warrant for his appointment and that they have no power under the above section to inquire whether he has been duly elected. THE QUEEN *v.* SHEPLEY - - 96

POOR-LAW—*continued.*
—— Removal of pauper—Appeal against order of removal—Notice of appeal - 625
See JUSTICES. 2.

POOR-RATE—*Small Tenements—Rateable Value—Rating of Owners—Deductions—"Voids" and Losses of Rent—Cost of Collection—Water-rate—Hypothetical Tenant—5 & 7 Wm. 4, c. 96, s. 1.*] The appellant was assessed to the poor-rate as owner of a small house let by the week to artizans, the landlord paying all outgoings. On appeal against the rate to quarter sessions the appellant claimed that in arriving at the gross estimated rental deductions should be made in respect of losses by reason of the house frequently remaining unlet and void for some time, and by reason of losses of rent through inability of tenants to pay, and in respect of the necessary cost of collection of the rent actually received. The recorder found that it was practically impossible to let the house on any other terms than those on which the appellant let it; that owing to voids and losses of rent the landlord received on an annual average 5 per cent. less than the aggregate of the weekly rents, and had to pay 5 per cent. as the cost of collecting the rents actually received; but he also found that, assuming a tenant from year to year could be obtained, the house could be reasonably let for a sum representing fifty-two times the weekly rent, the landlord paying all usual tenants' rates and taxes and the water-rate:—*Held*, that the gross estimated rental ought to be fixed by ascertaining the rent at which the house might reasonably be expected to let to a tenant in actual occupation from year to year free of the various tenant's payments specified in 6 & 7 Wm. 4, c. 96, s. 1; and not by assuming a hypothetical tenant who did not himself occupy the house, but sublet it to weekly tenants, and therefore that the deductions claimed in respect of voids, losses of rent, and cost of collection ought not to be made. SMITH *v.* CHURCHWARDENS, &C. OF BIRMINGHAM - 211

2. —— *Small Tenements let by the Week—Rateable Value—Deductions—"Voids" and Losses of Rent—Cost of Collection—Hypothetical Tenant—6 & 7 Wm. 4, c. 96, s. 1.*] The appellant was assessed to the poor-rate as owner of a small house let by the week at a rent of five shillings, the landlord paying all outgoings. On appeal against the rate to quarter sessions the appellant claimed that, in arriving at the gross estimated rental, deductions should be made in respect of losses by reason of such houses often remaining unlet and void for some time, and by reason of losses of rent through inability of the tenants to pay, and in respect of the necessary cost of collection of the rent actually received. The recorder, however, refused to allow such deductions, and confirmed the rate. The recorder found, in a case stated on appeal from sessions, that it was practically impossible to let the house on any other terms than those on which the appellant let it; but, assuming for rating purposes that a tenant from year to year could be obtained, the house could be reasonably expected to let from year to year at a rent of 13*l.* (which sum amounted to fifty-two times the amount of the weekly rent), the landlord paying all usual tenants' rates and taxes and water-rates. But he found that with respect to house

POOR-RATE—*continued.*
property of that description, whether let by the week or year, the landlord would be unable, by reason of "voids" and of losses by reason of non-payment of rent, to collect more than 95 per cent. of the rent and that he would have to pay 5 per cent. as the cost of collecting the rent actually received:—*Held* (affirming the decision of the Court below), that the recorder must be taken to have found as a fact that 13*l.* was the rent which a tenant from year to year as above-mentioned could reasonably be expected to give for the house; that there was nothing in the further facts found by him to shew that such finding was unreasonable or not justifiable in point of law, and therefore such finding was conclusive of the fact; and, that being so, that the appellant was not entitled to any of the deductions claimed, inasmuch as the test of gross estimated rental is the rent which a tenant from year to year would agree to give, and not the sum which the landlord ultimately receives. SMITH *v.* CHURCHWARDENS, &C. OF BIRMINGHAM - - - - C. A. 703

3. —— *Tithe Rent-charge—Distress on Owner of Rent-charge—6 & 7 Wm. 4, c. 71, ss. 69, 70—1 Vict. c. 69, s. 8.*] Poor-rate assessed upon the owner of tithe rent-charge under 1 Vict. c. 69, s. 8, is not recoverable by distress warrant against such owner. LAMPLUGH *v.* NORTON - C. A. 452

—— Rate collector—Bond for performance of duties—Breach of condition—Discharge of surety - - - - 394
See PRINCIPAL AND SURETY.

POUND BREACH—Discovery of documents—Penal action - - - 425
See PRACTICE. 11.

PRACTICE—*Appeal from Chambers—Appeal from Order made during Vacation—Time—Order LII., r. 3, 5; Order LIV., r. 24.*] In an appeal from the decision of a judge at chambers given in vacation, two clear days notice of motion must be given within five days, and for a day within eight days, after the decision, although no Divisional Court sits within the eight days. STEEDMAN *v.* HAKIM - - - - - C. A. 16

2. ——*Appeal—Jurisdiction—Appeals from County Courts—Leave to appeal—Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 19, 45.*] Where a Divisional Court has refused special leave to appeal, under s. 45 of the Judicature Act, 1873, from their decision given in an appeal from a county court, the Court of Appeal has no jurisdiction to hear an appeal from such refusal. KAY *v.* BRIGGS - - - - C. A. 343

3. —— *Costs—Costs of Counter-claim—Order LXV., r. 12.*] Order LXV., r. 12, by which a plaintiff, who recovers a sum not exceeding 50*l.* in an action of contract, is entitled only to costs on the county court scale unless the Court or a judge otherwise orders, does not apply to the case of a counter-claim. Where therefore a plaintiff recovered 48*l.* on his claim, and also succeeded upon a counter-claim for 123*l.*:—*Held*, that for the purposes of taxation the claim and counter-claim must be treated as independent actions; that the costs of the counter-claim followed the ordinary rule as to costs, and that the plaintiff was entitled to have the costs of his defence to the counter-claim taxed on the High Court scale. AMON *v.* BOBBETT - - - - C. A. 543

4. —— *Supreme Court—Costs—Joint Defendants in Action of Tort—Defendant severing in his Pleading—Verdict against both Defendants—Costs of separate Pleading—Taxation.*] In an action of tort against two defendants, they pleaded only payment into court, to which the plaintiff replied denying the sufficiency of the payment. One of the defendants afterwards obtained leave to amend by severing in his defence, and added separate defences accordingly. At the trial the plaintiff recovered a verdict against both defendants for an amount beyond that paid into court. On taxation of costs the master allowed the plaintiff the general costs of the action and trial as against both defendants, but the costs occasioned by the separate pleading of the one defendant as against him alone:—*Held*, that the taxation was right. STUMM *v.* DIXON - - - - - 99

5. —— *Costs—Taxation—Joint Defendants in Action of Tort—Defendant severing in Pleading—Judgment against both Defendants with Costs—Liability of Defendants for Costs of Separate Pleading—Order LXV., r. 1.*] In an action of tort against two defendants they pleaded jointly payment into court only. The plaintiff replied, denying the sufficiency of the payment. One of the defendants then obtained leave to amend his statement of defence, and added an alternative separate defence, denying any liability to the plaintiff. At the trial a verdict was found against both defendants for an amount beyond the sum paid into court, and judgment was entered for the plaintiff for that amount, with costs to be taxed:—*Held*, by Lord Esher, M.R., affirming the judgment of the Queen's Bench Division, that the defendant who delivered the separate defence was alone liable for the costs occasioned to the plaintiff by and in consequence of the separate pleading, and that the other defendant was not liable for those costs.—By Fry, L.J., dissenting, that both defendants were jointly and severally liable for all the costs of the action. STUMM *v.* DIXON [C. A. 529

6. —— *Execution—Receiver, Appointment of—Equitable Execution—Judicature Act, 1873, s. 25, sub-s. 8.*] A judgment having been obtained in an action to recover money due, the judgment debtor died, leaving a will by which she appointed an executor. The judgment debtor at the time of her death was possessed of certain furniture and chattels, and was carrying on a business. The judgment remaining unsatisfied, the judgment creditors obtained an order at chambers appointing a certain person receiver of the furniture and chattels and of the business, and to get in and receive the debts due to such business, and directing him to pay the balance which should appear due on his accounts in or towards satisfaction of the judgment:—*Held*, that, in the absence of any legal impediment to obtaining execution of the judgment in the ordinary course of law by fieri facias, or attachment of debts, and there being no special circumstances shewing it to be just or convenient that a receiver should be appointed, the order for appointment of a receiver was wrongly

PRACTICE—*continued.*

made, and ought to be rescinded.—*Whittaker* v. *Whittaker* (7 P. D. 15) discussed. MANCHESTER AND LIVERPOOL DISTRICT BANKING COMPANY *v.* PARKINSON - - - - C. A. 173

7. —— *Execution—Equitable Execution—Receiver—Retired Pay of Officer—Sum paid to Officer in respect of Commutation of retired Pay—Pensions Commutation Act*, 1871 (34 & 35 *Vict. c.* 36), *s.* 10—*Army Act*, 1881 (44 & 45 *Vict. c.* 58), *s.* 141.] A sum standing in the Bankruptcy Estates Account at the Bank of England to the credit of the judgment debtor, a retired deputy-commissary in the army, on the annulment of his bankuptcy, consisted partly of a sum paid to the trustee out of the retired pay of the judgment debtor, partly of a sum paid to the trustee out of money paid by the Paymaster-General in respect of the commutation of a part of his retired pay:—*Held*, by the Queen's Bench Division, that the judgment creditor was entitled to an order for the appointment of a receiver in respect of the sum arising from commutation money, but not in respect of the sum arising from retired pay:—*Held*, by the Court of Appeal, on appeal by the judgment creditor, as to the sum arising from retired pay, that the judgment of the Queen's Bench Division was right. CROWE *v.* PRICE - - - - C. A. 429

8. —— *Garnishee Order—Sufficiency of Affidavit in support of Application for—Rules of Supreme Court, Order* XLV., *r.* 1.] On an application for a garnishee order under Order XLV., r. 1, it is sufficient for the affidavit to state that the deponent is informed and believes that the garnishee is indebted to the judgment debtor. COREN *v.* BARNE - - - - - 249

9. —— *New Trial—Compensation for Land—Issue tried in High Court—Regulation of Railways Act*, 1868 (31 & 32 *Vict. c.* 119), *ss.* 41, 43.] The Court has no power to grant a new trial of an issue directed under s. 41 of the Regulation of Railways Act, 1868, to determine the right of compensation for lands taken for the purposes of a railway. BIRMINGHAM AND DISTRICT LAND COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - - - 435

10. —— *Parties—Adding Defendants—Right of Third Party to object—Order* XVI. *r.* 11.] The lessee for a term of years under a lease containing a covenant to repair agreed with D. to sell and assign to him the residue of the term, he undertaking to indemnify the lessee, without mentioning her assigns, in respect of any breach of covenant. D. entered into possession under that agreement, but no deed of assignment to him was executed, and upon the lessee's death her executors, having distributed her estate, assigned for a nominal consideration the residue of the term to her son, who thenceforth received the rent from D. and paid it to the lessors. At the expiration of the term the lessors sued the son for breach of the covenant to repair, and he claimed indemnity from, and brought in, D., as third party. The action was referred to an official referee, who, upon the application of the defendant, made an order adding the lessee's executors as defendants in order to enable them to claim indemnity from D. Neither the plaintiffs nor the executors objected

PRACTICE—*continued.*

to this order being made, but D. opposed it:—*Held*, upon these facts, that the official referee in adding the executors as defendants rightly exercised his discretion under Order XVI. r. 11. BYRNE *v.* BROWN - - - - C. A. 657

11. —— *Penal Action—Discovery—Discovery of Documents—Action for Treble Damages for Pound Breach and Rescue under* 2 *Wm. & M. sess.* 1, *c.* 5, *s.* 4—*Rules of Supreme Court*, 1883, *Order* XXXI., *rr.* 12, 13.] An action for pound-breach and rescue of chattels distrained for non-payment of tithe rent-charge, in which the plaintiff claims treble damages under 2 Wm. & M. sess. 1, c. 5, s. 4, is a penal action, and the plaintiff is therefore not entitled to an affidavit of documents. JONES *v.* JONES - - - 425

12. —— *Preliminary Acts — "Actions for damage by collision between vessels"—Rules of Supreme Court*, 1883, *Order* XIX., *r.* 28.] An action was brought by the owner of a barge and her cargo against the owners of a tug for negligence in towing, in consequence of which, as the plaintiff alleged, the barge came into collision with another vessel, and was lost with her cargo: *Held*, that the action was not one "for damage by collision between vessels" within the meaning of Order XIX., r. 28, and that the parties were not required to file preliminary acts as prescribed by the rule. ARMSTRONG *v.* GASELEE - - 250

13. —— *Production of Documents—Documents in the Hands of Persons not Parties to Action—Rules of Supreme Court*, 1883, *Order* XXXVII., *r.* 7.] The plaintiffs in an action applied under Order XXXVII., r. 7, for an order for leave to inspect the books of persons who were not parties to the action, and for the production of such books at the office of the plaintiffs' solicitor:—*Held*, that the Court had, under Order XXXVII., r. 7, no jurisdiction to make the order. STRAKER *v.* REYNOLDS - - - - - 262

14. —— *Solicitor—Action on untaxed Bill of Costs—Summons for Liberty to sign Final Judgment—Form of Order—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*Order* XIV., *r.* 1.] In an action upon a solicitor's untaxed bill of costs, where the defendant admits the retainer and the work done, and only disputes the propriety of the charges, an order giving leave to sign final judgment under Order XIV., r. 1, may be made after appearance and before taxation of the bill, provided that the order preserves the right of the defendant under s. 37 of the Solicitors Act, 1843, to the costs of taxation of the bill, if more than one-sixth is taxed off it. Such an order should direct that the bill of costs be taxed pursuant to that statute, and that judgment be signed for the amount of the master's allocatur. The proper form of order settled by the Court of Appeal. SMITH *v.* EDWARDES - - - C. A. 10

15. —— *Solicitor, Change of—Cause set down for Trial—Notice to the Associate — Order* VII., *r.* 3.] Where a change of solicitors has taken place after a cause has been set down for trial, it is the duty of the new solicitor to inform the associate of the change, in order that the name of the solicitor responsible for the conduct of the cause may appear on the record. HUNT *v.* FINEBURG - - - - - C. A. 259

PRACTICE—*continued.*

16. —— *Time — Delivery of Pleadings — Counter-claim—Reply—Orders XIX., r. 2; XXI., r. 6; XXIII., rr. 1, 4.*] Where a counter-claim is pleaded with a defence, the plaintiff has twenty-one days within which to deliver his reply to the defence and counter-claim. RUMLEY *v.* WINN [265

17. —— *Writ specially indorsed—Sufficiency of Indorsement—Rules of Supreme Court, 1883, Order III., r. 6, Order XIV.*] A writ is specially indorsed within the meaning of Order III., r. 6, and Order XIV. if the indorsement gives sufficiently specific particulars to bring to the mind of the defendant knowledge as to what the plaintiff's claim is. Any indorsement which would have been a sufficient special indorsement within the meaning of s. 25 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), to entitle the plaintiff to judgment, under s. 27, in default of appearance, is a special indorsement within the meaning of Order III., r. 6, and Order XIV. BICKERS *v.* SPEIGHT - - - - 7

—— Action for mandamus—Railway company —Refusal to register transfer - 463
See MANDAMUS.

—— Case stated—Power to state case for opinion of Court—Special Act - - 504
See INSURANCE.

—— County Court—Action for sum not exceeding 100*l.*—Commenced in High Court—Remitter to county court for trial — Jurisdiction - - - - 513
See COUNTY COURT.

—— Next friend—Infant—Compromise—Conduct of case - - - - 577
See INFANT.

—— Pleading—Accord and satisfaction to one of two obligees - - - - 537
See BOND.

—— Submission—Application for leave to revoke —Arbitrator making a mistake of law in a matter within his jurisdiction 669
See ARBITRATION.

PRELIMINARY ACTS—"Actions for damage by collision between vessels" - 250
See PRACTICE. 12.

PRINCIPAL AND AGENT — *Indemnity — Stock Exchange, Usage of—Defaulting Broker.*] The defendant employed the plaintiff, a broker on the Stock Exchange, to purchase shares, which he accordingly did. Before the settling-day the plaintiff became a defaulter on the Stock Exchange through inability to meet his engagements, and, in accordance with the rules of the Stock Exchange, the accounts which he had open were closed as between himself and the jobbers at the then current prices as fixed by the official assignee of the Stock Exchange. The account in respect of the shares bought for the defendant when closed, as above mentioned, shewed a balance in favour of the jobbers against the plaintiff. According to the practice of the Stock Exchange such closing of the account does not affect the client if he, nevertheless, desires to have the contract completed, and is not in default to the defaulting broker; and the jobber in that case is bound to complete on the settling-day. The

PRINCIPAL AND AGENT—*continued.*

plaintiff, on the same day when he was declared a defaulter and his accounts closed, subsequently informed the defendant that he could either have the contract completed, as above mentioned, or he might accept the official prices. The defendant said that he would do the latter:—*Held*, that the defendant, having ratified the closing of the account before the settling-day, was liable to indemnify the plaintiff against the amount for which the plaintiff was liable to the jobbers on such closing.—*Duncan* v. *Hill* (Law Rep. 8 Exch. 242) distinguished. HARTAS *v.* RIBBONS - C. A. 254

—— Employment of agent to bet on account of principal - - - - 680
See GAMING.

—— Liability of execution creditor for wrongful seizure by sheriff—Direction to sheriff to levy on particular goods - - 614
See EXECUTION.

—— Money paid to bankrupt without notice of adjudication — Liability of innocent agent - - - - 438
See BANKRUPTCY. 7.

PRINCIPAL AND SURETY — *Liability — Discharge—Rate Collector—Bond for Performance of Duties—Breach of Condition—Irregular Mode of accounting — Acquiescence — Connivance—District Rate—Borough Rate—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 195—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 144.] Mere laches of the obligee, or a mere passive acquiescence by the obligee in acts which are contrary to the conditions of a bond, is not sufficient of itself to relieve the sureties. The plaintiffs sued the defendants, as sureties, on two bonds, the first given to the plaintiffs, as urban sanitary authority, to secure the due performance of the duties of a collector of district rates under the Public Health Act, and the second given to the plaintiffs, as the corporation of a borough, to secure the performance by the same person of his duties as collector and receiver of borough rates under the Municipal Corporations Act. The evidence shewed that the plaintiffs had acquiesced in an irregular mode of accounting on the part of the collector, but that the collector was never suspected of dishonesty until a year after the date of the second bond, when defalcations were discovered, and he was dismissed. The jury in answer to questions put to them found first, that, the plaintiffs had permitted the collector to retain moneys in his hands for a longer period than a week (which was contrary to s. 195 of the Public Health Act, 1875, and to the conditions of the bonds, and to a resolution passed by the plaintiffs before the bonds were given); and, secondly, that the plaintiffs had permitted him to mix the proceeds of the different rates:—*Held* (by Charles, J., on further consideration, and by Denman and Stephen, JJ., dismissing a motion to enter judgment for the defendants, or for a new trial), that the plaintiffs' acquiescence in the collector's irregular mode of accounting was not such connivance as to discharge the sureties; that upon the evidence there were no questions which the Judge could have been properly required to leave to the jury other than those he did leave; and that on

PRINCIPAL AND SURETY—*continued.*
the facts proved at the trial, and on the findings, there was no defence to the action, and the plaintiffs were entitled to judgment. The resolution directing the borough rate to be levied had fixed the amount in the pound:—*Held*, that, although, on the true construction of s. 144 of the Municipal Corporations Act, 1882, the resolution ought only to have ordered a rate for a particular total amount, and assessed the contributions from each parish, leaving it to the overseers to fix the amount in the pound, nevertheless the addition of the amount did not vitiate the order, and the rate was valid. *Held* (by Denman and Stephen, JJ.), that on the construction of the second bond, in which the person guaranteed was described as "collector and receiver," the sureties were liable for his breach of the condition to pay over moneys received by him, independently of the question of the validity of the rate. Mayor, &c., of Durham *v.* Fowler - - - - - 394

PRODUCTION OF DOCUMENTS—Documents in the hands of persons not parties to the action - - - - - 262
See Practice. 13.

PROHIBITION—Mayor's Court—Jurisdiction—"Cause of action arising wholly or in part within the city of London" - 128
See Mayor's Court. 2.

RAILWAY—Compensation for land—Issue tried in High Court—New trial - 435
See Practice. 9.

—— Transfer of shares—Refusal to register—Remedy by action - - - 463
See Mandamus.

RAILWAY COMPANY—*Excessive Charges—Neglect to afford "Reasonable facilities"—Causing "Undue or unreasonable prejudice or disadvantage"—Jurisdiction of Railway Commissioners—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2—*Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48)—*Prohibition.*] The mere refusal by a railway company to receive and forward the traffic of persons in general except upon prepayment of charges somewhat in excess of the maximum authorized rates is not a denial of "reasonable facilities," nor subjecting the senders of such traffic to "undue or unreasonable prejudice or disadvantage" within the meaning of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2, or the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), and the Railway Commissioners have no jurisdiction under those Acts to restrain a railway company from making such charges, and cannot give themselves jurisdiction by finding as a fact that the demand of prepayment of such charges is a denial of "reasonable facilities" or subjecting persons or their traffic to "undue or unreasonable prejudice or disadvantage" within 17 & 18 Vict. c. 31, s. 2. The Queen *v.* Railway Commissioners and Distington Iron Company - - - 642

RECEIVER — Appointment of — Execution — Equitable execution - - 173
See Practice. 6.

RECEIVER—*continued.*
—— Bankruptcy—Petitioning creditor—Receiver appointed in Chancery Division - 179
See Bankruptcy. 4.

—— Secured creditor — Judgment creditor — Equitable execution - - 187
See Bankruptcy. 5.

RECEIVING ORDER—Rescission—Jurisdiction—Consent of creditors - - 632
See Bankruptcy. 9.

REGISTRATION—Deed of arrangement with creditors—Execution of deed by creditors—Alteration of deed - - - 685
See Deed of Arrangement with Creditors.

RELEASE—Accord and satisfaction to one of two obligees - - - - 537
See Bond.

REVENUE—*Excise—Keeping Dog without Licence—Previous Conviction—Reduction of Fine—7 & 8 Geo. 4, c. 53, s. 78—30 & 31 Vict. c. 5, s. 8—42 & 43 Vict. c. 49, s. 4.*] Where at the hearing of a summons for keeping a dog without a licence it is proved that the defendant has been convicted on a former occasion of a similar offence, but such previous conviction is not stated in the information, the case cannot be treated as the case of a first offence, within the meaning of s. 4 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and therefore the magistrate has no power under that section to reduce the amount of the fine imposed for the offence by 30 & 31 Vict. c. 5, s. 8, and the only power to reduce such fine is that given by 7 & 8 Geo. 4, c. 53, s. 78, under which statute it cannot be reduced to less than one-fourth of the amount. Murray *v.* Thompson [142

2. —— *Income Tax—Annual Profits or Gains—Profits or Gains arising from Employment or Vocation—Grant by Curates Augmentation Fund—Income Tax Acts*, 1842 (5 & 6 *Vict. c.* 35, *s.* 146), *Sched. E., and* 1853 (16 & 17 *Vict. c.* 34, *s.* 2), *Sched. D.*] The council of the Curates Augmentation Fund made a grant of £50 to a curate in recognition of faithful service for more than fifteen years. The grant was renewable at the discretion of the council, and such renewal was upon the condition that the curate obtained donations to the fund to half the amount of the grant:—*Held*, that the curate was not assessable to the income tax in respect of the sum granted, either under the Income Tax Act, 1842, Sched. E., or 1853, Sched. D. Turner *v.* Cuxon - - 150

3. —— *Income Tax—Banker—Loan for less than a Year—Payment of Interest—Deduction of Income Tax—"Yearly interest of money or any annuity or other annual payment"—16 & 17 Vict. c.* 34, *s.* 40.] Interest upon a loan by a banker to a customer for a period of less than a year is within the words "any yearly interest of money or any annuity or other annual payment" in 16 & 17 Vict. c. 34, s. 40, and therefore the customer is entitled to deduct income tax from such interest, and if such deduction is made the banker is not liable to pay income tax on such interest.—*Bebb* v. *Bunny* (1 K. & J. 216) followed. Goslings & Sharpe *v.* Blake - - - - 153

REVENUE—*continued.*

4. —— *Customs and Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51), *ss.* 11, 15—*Associations established for Trade or Business—Duty—Exemptions—Liability to render an Account.*] A body corporate or unincorporate "established for any trade or business" within the meaning of the Customs and Inland Revenue Act, 1885, s. 11, sub-s. 5, is not bound to deliver any account of its property under s. 15. In 1870 the Council of "The Law Reports" were incorporated under the provisions of the Companies Act, 1867, obtaining a licence under s. 23 to be registered as a limited company without the addition of the word "limited." The association was established for the objects of preparing and publishing, under gratuitous professional control, reports of judicial decisions; of issuing digests and other publications relating to legal subjects, including the statutes; of continuing the series of reports then called "The Law Reports"; of acquiring the copyright of any other reports, and of doing any other things incidental or conducive to those objects. In carrying them out the association employed editors, reporters, printers, and publishers, and prepared, printed, and published reports and other legal publications, and supplied them to subscribers and others for payment. By the memorandum of association all the property and income of the association were applicable solely to the promotion of the above objects, and no part thereof could be paid as dividend, bonus, or otherwise, to any member:—*Held*, that the association was established for a trade or business within the meaning of sub-s. 5 of s. 11 of the Customs and Inland Revenue Act, 1885, and was therefore entitled to exemption from the duty imposed by that section. IN RE DUTY ON ESTATE OF INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES - - - 279

5. —— *Income Tax—Allowances—"Charitable purposes"*—5 & 6 *Vict. c.* 35, *s.* 61, *Sched. A.*] By Sched. A. of the Income Tax Act of 1842 (5 & 6 Vict. c. 35), allowances are to be made in respect of the duties in that schedule on, inter alia, the rents and profits of lands, tenements, hereditaments, or heritages vested in trustees, for charitable purposes, so far as the same are applied to charitable purposes.—Freehold estates were conveyed to trustees, upon trust to apply two-fourths of the income for the purpose of maintaining, supporting, and advancing the missionary establishments among heathen nations of the Protestant Episcopal Church, known as the Moravians; one-fourth for the maintenance, support, and education of the children of ministers and missionaries of the church, and the remaining fourth to the maintenance of establishments for the residence and support of single persons belonging to the church. On an application for a mandamus to the commissioners to grant an allowance in respect of the rents and profits on which income tax had been paid:—*Held*, that the trustees were entitled to the allowance.—By Lord Esher, M.R., and Lopes, L.J., on the ground that in a Taxing Act applicable to the three kingdoms, the words "charitable purposes" must be taken in their ordinary signification and not as technical legal terms; that the words import

REVENUE—*continued.*

a benefit to persons who, by reason of poverty, would not otherwise obtain such benefit, and that they included all the objects of the trust.—By Fry, L.J., on the ground that the words are technical words, having the same meaning in all three kingdoms; that they comprise all the uses and intents mentioned in the preamble to 43 Eliz. c. 4, and all analogous uses and intents, and consequently included all the objects of the trust. THE QUEEN *v.* COMMISSIONERS OF INCOME TAX [C. A. 296

6. —— *Income Tax—Profits or Gains—Interest arising from Investments made for Purposes of a Business*—5 & 6 *Vict. c.* 35, *ss.* 52, 102—16 & 17 *Vict. c.* 34, *ss.* 1, 2, *Sched. D.*] The interest arising from investments made by a life insurance company for the purposes of their business, income tax on which had been deducted at its source, exceeded the amount of the profits of the company for the year of assessment. The company had also during the year received interest on investments from which there had been no deduction for income tax:—*Held*, affirming the judgment of the Queen's Bench Division, that the company were liable to assessment to income tax in respect of such last-mentioned interest. CLERICAL, MEDICAL, AND GENERAL LIFE ASSURANCE SOCIETY *v.* CARTER - C. A. 444

7. —— *Income Tax—County Asylum—Duty on Income from Land—The Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 60, 61, *No.* 6, *Sched. A.*—*The Income Tax Act*, 1853 (16 & 17 *Vict. c.* 45), *s.* 2, *Sched. A.*—*The Lunatic Asylums Act*, 1853 (16 & 17 *Vict. c.* 97).] The justices of a county were assessed to the income tax under Schedule A. of the Income Tax Act, 1842, in respect of such parts of a county lunatic asylum established under the Lunatic Asylums Act, 1853, as were occupied by officers having an income of more than one hundred and fifty pounds per annum. On a case stated:—*Held*, affirming the judgment of the Queen's Bench Division, that the premises assessed were not in the occupation of the Crown or of persons using them exclusively in and for the service of the Crown, and were therefore not exempt from assessment to the income tax.—The only question argued before the commissioners and raised by the case stated by them, having been whether the premises could be assessed, the Court of Appeal declined to decide who were the proper parties to be assessed. BRAY *v.* JUSTICES OF LANCASHIRE - - - - C. A. 484

RULES—Building society—Mortgage—Alteration of rules after date of mortgage.
See BUILDING SOCIETY - - 373

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SALE OF GOODS—*Factors Act*, 1877 (40 & 41 *Vict.* c. 39), *s.* 4—*Vendee in possession of Document of Title—Statute of Frauds, s.* 17.] The Factors Act, 1877, s. 4, provides that, where any goods have been sold or contracted to be sold, and the vendee obtains the possession of the documents of title thereto from the vendor, any sale, pledge, or disposition of such goods or documents by such vendee so in possession shall be as valid and effectual as if such vendee were an agent or person entrusted by the vendor with the documents within the meaning of the principal Acts as amended by the Act itself, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods.—It is not necessary, in order that the above-mentioned section should be applicable, that there should be a memorandum of the contract for sale of the goods so as to satisfy the Statute of Frauds; it is sufficient that there should be a de facto contract for sale, the vendee under which has obtained from the vendor possession of the documents of title to the goods; and a sale by such a vendee will give to a bonâ fide purchaser without notice a good title to the goods, free from any lien or other right of the original vendor in respect thereof. Hugill *v.* Masker - - - C. A. 364

2. —— *Memorandum in Writing—Memorandum after Action—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 17.] A note or memorandum of a contract for the purposes of the 17th section of the Statute of Frauds must, in order to be available in an action on the contract, have been in existence when the action was commenced. Lucas *v.* Dixon - - - - - C. A. 357

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WATERWORKS COMPANY—*Inclosure Act—Separate Ownership of Surface and Minerals—Compulsory Purchase—Right to work Minerals—Damage to Waterworks—Right of Support—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 18, 22, 23.] By an Inclosure Act the common lands of a manor, the fee simple of which, with the mines and minerals thereunder, and power to work the same, had previously been vested in the lord of the manor, subject to certain rights of common of pasture, were inclosed and divided into allotments. The Act provided that the lord of the manor should enjoy all mines and minerals as fully and freely as if the Act had not passed, without paying damages or making satisfaction for so doing, and empowered him to make all convenient ways, and for that purpose to remove fences, trees, or other obstructions. The Act further provided that the annual rental of 500 acres (out of about 20,000) should be set apart to provide for the compensation to which the allottees might thereafter be entitled, any deficiency to be made up by means of a rate levied upon the allottees. Afterwards the plaintiffs, a waterworks company incorporated under an Act of Parliament, which incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, purchased compulsorily from the representative of the allottee land forming part of one of such allotments, and constructed a reservoir thereon. The defendant, claiming title under the lord of the manor, gave notice to the plaintiffs of his intention to work the coal under such land within forty yards of the reservoir. The plaintiffs did not offer to purchase the minerals, and the defendant worked the coal according to the usual course and practice of mining, and thereby caused damage to the reservoir. The plaintiffs sued in respect of such damage:—*Held* (by Cave and A. L. Smith, JJ.), that the Inclosure Act did not empower the lord of the manor and his representatives to work the minerals in such a manner as to let down the surface. *Held* (by Cave, J.), that the plaintiffs had purchased the whole of the allottee's interest, namely, the ownership of the surface together with the right of support, and the defendant had only the same right as he had had before the purchase by the plaintiffs, namely, the right to work the minerals, leaving sufficient to support the surface, and therefore the plaintiffs were entitled to recover.

WATERWORKS COMPANY—*continued.*

Held (by A. L. Smith, J.), that, as at the date of the purchase by the plaintiffs the surface and the minerals were vested in different owners, and the plaintiffs had purchased compulsorily from the owner of the surface, and had given no notice to treat in respect of the minerals, all that they were entitled to was the ownership of the surface, without any right of support as against the defendant, and therefore they had no cause of action for damage caused by the working by the defendant of the minerals according to the usual course and practice of mining, and were not entitled to recover. CONSETT WATERWORKS COMPANY *v.* RITSON - - - - 318

2. —— *Inclosure Act—Separate Ownership of Surface and Minerals—Compulsory Purchase—Right to work Minerals—Damage to Waterworks—Right of Support—Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 18, 22, 23.] CONSETT WATERWORKS COMPANY *v.* RITSON - C. A. 702

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